82-458

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ROBERT M. NEWELL, ESQ.,
650 S. Grand Avenue,
Suite 500,
Los Angeles, Calif. 90017,
(213) 629-1231,
Attorney for Petitioners.

Of Counsel:

JAMES G. MCCAIN, ESQ.,
P.O. Box 475,
Corcoran, Calif. 93212,
(209) 992-414,

ERNEST M. CLARK, JR., ESQ.,
707 Wilshire Boulevard,
Suite 3200,
Los Angeles, Calif. 90017,
(213) 626-0211.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

Since this matter comes before the Court in a rather unusual fashion, it is appropriate to summarize the procedural history of this matter in order that the questions raised in this petition can be placed in their proper perspective.

TABLE OF CONTENTS

Page

Questions Presented 1
Opinions Below 1
Jurisdiction 2
Procedural History of This Case 2
Petitioners 5
Water Rights in the Kings River 6
Conservation Storage 6
Constitutional Issues 7
Statutes Involved 7
Reasons for Granting the Writ 11

I.

The Court of Appeals Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court 11

A. California Effectively Overruled Tulare I ... 11

B. Tulare II Is Contrary to Bryant v. Yellen, Supra 18

II.

Constitutional Issues 22

A. Were the Petitioners Denied Due Process of Law by Virtue of the Fact That the Court of Appeals Refused to Pass Upon the Validity of the Petitioners' Estoppel Defense Which They Had Established in the District Court 22

B. It Is Unconstitutional for the United States to Enforce Acreage Limitations on Conservation Storage in Flood Control Reservoirs West of the 100° Meridian but Not East Thereof 24

Page

C. It Is Unconstitutional for the Federal Government to Pursue a Policy of Land Reform in the West Through the Agency of the 160-Acre Limitation 26

Conclusion 28

INDEX TO APPENDICES

Exhibit A. Findings of Fact, Conclusions of Law and Judgment Entered by the District Court in This Case ..... App. p. 1

Exhibit B. Opinion of the United States Court of Appeals for the Ninth Circuit 22

Wallace Circuit Judge, Concurring 33

Exhibit C. Judgment 37

TABLE OF AUTHORITIES CITED

Cases — Page

Bryant v. Yellen, 447 U.S. 352 (1980) 5, 7, 18, 19, 20, 21, 22, 28

California v. United States, 438 U.S. 645 (1978) 5, 7, 12, 14, 15, 16, 17, 25, 28

Consolidated Peoples Ditch Company v. Foothill Ditch Company (1928) 205 Cal. 54 16

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958) 11, 12

Kansas v. Colorado, 206 U.S. 461 (1907) 26

McCullough v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819) 27

United States v. Butler, 297 U.S. 1 (1937) 27

United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1976) (Tulare I) 4, 5, 7, 11, 12, 14, 17, 23, 26

Statutes

Boulder Canyon Project Act, Sec. 6 ..... 19, 20

Flood Control Act of 1944, Sec. 8, 58 Stat. 887 (43 U.S.C. §390) 4, 7, 8, 17, 19, 20, 25

Flood Control Act of 1944, Sec. 10, 58 Stat. 887, 901 ..... 2, 8, 9, 15, 16, 17

Omnibus Adjustment Act of May 25, 1926, Sec. 46, 44 Stat. 649 (43 U.S.C. §423(e)) 9, 10, 11

Reclamation Act of 1902, Sec. 8, 32 Stat. 390 ..... 11, 13, 16

58 Statutes at Large, Sec. 891 2

58 Statutes at Large, Sec. 901 2

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1345 2

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners Tulare Lake Canal Company and Tulare Lake Basin Water Storage District respectfully request that a writ of certiorari issue to review the judgment of the United States of Appeals for the Ninth Circuit entered on May 17, 1982.

OPINIONS BELOW.

The opinion of the Court of Appeals dated May 17, 1982 appears in a separate appendix to this petition as Exhibit B. The findings of fact and conclusions of law of the United States District Court for the Eastern District of California appear in the appendix as Exhibit A. The opinion of the District Court, reported at 340 F. Supp. 1185 (1972) appears in the appendix as Exhibit C.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based on 28 U.S.C. § 1345.

PROCEDURAL HISTORY OF THIS CASE.

Section 10 of the Flood Control Act of 1944 authorized the construction of the Pine Flat Dam in the following language:

> "The project for flood control and other purposes for the King's River and Tulare Lake Basin is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630 . . . Provided further, that the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or on installments, *for conservation storage*, when used . . ." (Emphasis supplied) (58 Stat 891, 901).

The Pine Flat Dam was completed in 1952. There ensued a long-running argument between the United States and the landowners as to how much the latter should pay the United States for the conservation storage rights in the Pine Flat Reservoir. The United States contended that the storage rights were reasonably worth $20,000,000; the landowners and the State of California took the position that the storage rights were worth $10,000,000. This dispute was resolved by Secretary of the Interior Milton A. Krug who ruled that the landowners should pay the United States $14,250,000 for the storage rights.[1] The landowners were willing to pay this sum to the government provided they were assured that

---

[1]Although the 1944 Act directed the Secretary of War to negotiate a contract with the landowners, President Harry S. Truman ordered the Secretary of the Interior to assume that responsibility.

the 160-acre limitation of reclamation law would not apply to their stored water. Several responsible officials of the Department of the Interior represented to the landowners that the 160-acre limitation would not apply to stored water once they had paid the government $14,250,000 fixed by Secretary Krug. Thereupon, a contract was negotiated between the United States and the landowners to reflect that understanding. However, with the advent of the Kennedy administration, the new Solicitor for the Department of the Interior, Frank J. Barry, reversed the several rulings of his predecessors and opined that acreage limitations should apply to privately owned water stored in the Pine Flat Reservoir. An impasse resulted: the landowners refused to sign a payment contract which imposed the 160-acre limitation upon stored water and the government threatened to disallow the landowners some $7,000,000 of credits toward their principal obligation of $14,250,000, which they had acquired through a series of annual interim storage contracts with the United States. As a means of resolving this dispute, the United States and the landowners agreed to submit this question to the Courts for a decision. This lawsuit is that "test case".

In order to present this issue before the Court, the petitioner Tulare Lake Canal Company ("Canal Company") paid in full its share of the $14,250,000 allocated to conservation storage in the Pine Flat Reservoir, and, as required by California law, the Canal Company delivered stored water to its shareholders without regard to any restrictions which would have been imposed had the 160-acre limitation applied. The United States filed this action in 1963 by which it sought an injunction against the Canal Company enforcing the 160-acre limitation.

It was the position of the United States that section 8 of the 1944 act imposed the 160-acre limitation on conservation

storage in the Pine Flat Reservoir. The petitioners asserted both statutory and constitutional defenses. The District Court found for the petitioners on statutory grounds. The principal findings of the District Court were: (1) section 8 of the 1944 Act did not impose the 160-acre limitation upon privately owned water stored in the Pine Flat Reservoir; (2) if the 160-acre limitation ever did apply, the petitioners were relieved of that obligation upon payment to the United States of their share of the capital cost of the project allocated to conservation storage; and (3) the United States was estopped to enforce the 160-acre limitation on the Pine Flat project. The District Court did not reach the constitutional issues tendered by the petitioners. 340 F. Supp. 1185 (E.D. Cal. 1972).

The Court of Appeals reversed (535 F. 2d 1093 (9th Cir. 1976) ("*Tulare I*")). The principal holdings of the Court of Appeals were: (1) that section 8 of the 1944 Act imposed the 160-acre limitation upon conservation storage in the Pine Flat Reservoir; however, the landowners were free to take their water under natural flow conditions free of the 160-acre limitation and (2) that payment in full of the capital cost of the project allocated to conservation storage would not relieve the defendants of the burden of the 160-acre limitations. The Court of Appeals did not refer to the estoppel defense nor any of the facts relevant thereto in its opinion.

On remand to the District Court, the petitioners moved the Court to hold all matters in abeyance until the constitutional issues had been resolved. The Court granted the petitioners' motion. The government thereupon moved for summary judgment on the constitutional issues. The Court granted the government's motion. The petitioners appealed.

While the appeal on the constitutional issues was pending, this Court reversed the Court of Appeals in two major water

cases, *California v. United States*, 438 U.S. 645 (1978) and *Bryant v. Yellen*, 447 U.S. 352 (1980). It is the view of the petitioners that these two decisions effectively overruled *Tulare I*. Accordingly, they moved the Court of Appeals to recall its mandate in *Tulare I*.

The petitioners' appeal on the constitutional issues and their motion to recall the mandate were consolidated for hearing before the Court of Appeals.

On May 17, 1982, the Court of Appeals affirmed the District Court's decision on the constitutional issues and denied the petitioners' motion to recall the mandate ("*Tulare II*"). This petition requests the Court to review these rulings.

There are certain terms used in this petition whose meaning should be defined.

Petitioners.

(1) The Tulare Lake Canal Company is a California mutual water company which delivers to its shareholders through canals and works owned by it, Kings River water appropriated under vested, non appurtenant water rights for irrigation . . . The Company is one of the 28 entities which have contracted with the United States for the exclusive and perpetual storage use of Pine Flat Dam for irrigation purposes, such contracts in the aggregate exhausting the entire capacity of Pine Flat Dam for the storage of water for irrigation purposes.[2]

(Finding of Fact No. 1, Appendix, p. 1).

(2) The Tulare Lake Basin Water Storage District is a public entity organized in accordance with the laws of the State of California. It holds a vested right to Kings River

---

[2]The Tulare Lake Canal Company has no subsidiaries and is not affiliated with any other corporation.

and is one of the 28 entities which have contracted with the United States for the perpetual and exclusive use of the Pine Flat Reservoir for conservation storage. Its water rights are allocated among the landowners within its boundaries in proportion to the land they own.

(3) The Salyer Land Company is a California corporation which farms several thousands of acres of land in the Tulare Lake Basin. Some of its land is located within the boundaries of the Tulare Lake Basin Water Storage District.

Water Rights in the Kings River.

All of the water rights in the Kings River are vested in the 28 diverting entities pursuant to the laws of the State of California. With one exception, none of the 28 diverting entities is a landowner. They are private stock companies, or public entities such as irrigation districts or water storage districts.

No landowner whose lands are appurtenant to the Kings River has any appropriative right to any Kings River water by virtue of riparian nature of his land. Every landowner in the Kings River service who has a right to any Kings River water holds that right because: (a) he owns stock in a mutual water company, and/or (b) his land is located within the physical boundaries of a public district. There is no Kings River water available for appropriation by the United States.

Conservation Storage.

Conservation storage refers to the storing of his water in a flood control reservoir, in this case in the Pine Flat Reservoir, by a private landowner who had a vested right to that water when the Flood Control Act of 1944 was enacted. The usual example of conservation storage is one where a land owner will store a portion of his share of the flow of

the Kings River occasioned by the spring snow melt in the Pine Flat Reservoir in order that he can use that stored water to irrigate his crops later in the summer or fall.

Contrary to the situation in most of the country where the rivers flow all year long, the Kings River in the normal course of events would usually be dry, or at best, only a small trickle by mid-summer. By storing some of his water in the reservoir for use for irrigation later in that year, a farmer can make much more efficient use of his Kings River water for the growing of his crops.

Specifically, these questions are presented by the May 17, 1982 Opinion of the Court of Appeals:

1. Did *California* effectively overrule *Tulare I*?
2. Did *Bryant* effectively overrule *Tulare I*?

Constitutional Issues.

1. Were the petitioners denied due process of law by virtue of the fact that the Court of Appeals refused to pass upon the validity of the petitioners' estoppel defense which they had established in District Court?

2. Is it an invidious discrimination to impose the 160-acre limitation on the conservation storage of privately owned water in flood control reservoirs located west of the 100° meridian but not east thereof?

3. Is it constitutional for the Federal Government to seek to use the 160-acre limitation as an agency for land reform?

Statutes Involved.

Section 8 of the Flood Control Act of 1944, 58 Stat. 887, 891, 43 U.S.C. § 390, provides:

> "Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated

under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of the structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirements shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army Engineers, which provides conservation storage of water for irrigation purposes."

Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 901 (the provision of the 1944 Act which gave specific authorization for construction of the Pine Flat Dam, the flood control project at issue in this case) provides, in pertinent part:

"The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such

modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of $19,700,000: *Provided*, That the conditions of local cooperation specified in said document shall not apply: *Provided further*, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further*, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations."

Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 43 U.S.C. § 423(e), provides:

"No water shall be delivered upon the completion of any new project or new division of a project until a contract or controls in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate

with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of Interior: and that until one-half of the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment."

REASONS FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. *California* Effectively Overruled *Tulare I*.

Prior to this Court's *California* decision, it was assumed that the Federal Government was not obliged to comply with state law when it undertook to develop a reclamation project. This assumption was based in large measure on this Court's decision in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), which seemed to hold that section 8 of the Reclamation Act of 1902 (32 Stat. 390) had little relevance when the Federal Government set up a reclamation project. *Ivanhoe* was the principal case authority relied upon by the Court of Appeals in *Tulare I*. It cited that case nine times in that opinion. Based upon *Ivanhoe*, the Court of Appeals assumed that Congress had the power to interfere with a private individual's vested water right where it authorized the construction of flood control projects as in the case of the Flood Control Act of 1944 and held that Congress had intended to override state law and impose the 160-acre limitation upon a private individual's vested water right if that individual should store his irrigation water in a flood control reservoir. The Court of Appeals read section 46 of the Omnibus Adjustment Act of 1944 as applying to vested water rights.

The Court of Appeals did not make the fundamental distinction that reclamation law applies only to water owned by the Federal Government and offered by it for sale to farmers for irrigation purposes. Based upon its reading of *Ivanhoe*, the Court of Appeals blithely assumed that Congress had the same power to impose conditions upon a privately owned vested water right as it did upon water

which was in fact owned by the United States. *California* repudiated the dictum in *Ivanhoe* upon which the Court based *Tulare I* and in so doing effectively overruled that decision.

First, the clear thrust of *California* is that a reclamation project refers solely to the situation in which the Federal Government has acquired title to a water right under state law. "From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. First, and of controlling importance to this case, the Secretary would have to appropriate, purchase or condemn necessary water rights in strict conformity with state law . . ." (438 U.S. at p. 665). As a matter of further fact, it is the Federal Government's ownership of that water which it has acquired under state law which empowers it to impose the 160-acre limitation upon that water. The Federal Government owned the Friant Dam on the San Joaquin River, the Friant-Kern Canal which transported the water to farmers who had never before had access to that water and the water itself which it offered for sale to those farmers. It was this fact of ownership which gave the Federal Government the power to impose the conditions of the 160-acre limitation and appurtenancy upon the use of that water after it had been sold by the Federal Government. In *Ivanhoe* this Court said, "The Federal Government has the power to impose reasonable conditions upon the use of federal funds, federal property and federal privileges". This Court correctly noted in its *California* decision that the so-called "acreage limitations" is a misnomer. It is really a limit on the amount of reclamation water that Federal Government can sell to any one landowner.[3]

---

[3]". . . and in §§ 5 Congress forbade the *sale* of reclamation water to tracts of land of more than 160 acres." (Emphasis supplied) 438 U.S. at p. 668, footnote 21).

Furthermore, the imposition of the 160-acre limitation did not interfere with state control of the "appropriation, use and distribution of water in irrigation, or any vested right acquired thereunder" in the language of section 8 of the 1902 Act.

However, a wholly different situation obtains when the Federal Government claims that it has the power to interfere with vested water rights simply because that water is stored in a flood control reservoir. The Federal Government does not own that water. Therefore, before the Federal Government can seek to interfere with those vested rights, two questions have to be answered: (1) By what authority does the Federal Government have the power to interfere with water rights vested under state law? and (2) does the Act in question clearly manifest an intention upon the part of Congress to interfere with vested water rights, assuming that it has the power to do so?

The question of the source of the power of the Federal Government to impose the 160-acre limitation in a vested water right is squarely tendered by the case at bench. In its *Tulare II* opinion, the Court of Appeals cast about for some plausible reason to justify the Federal Government's interference with a private citizen's use of his own property and found it in an alleged subsidy:

> "Contrary to appellant's position the Pine Flat Project did involve a federal subsidy to provide this and other benefits justifying the imposition of reasonable conditions upon receipt of the benefits" (Appendix p. 34).

This statement is contrary to the following finding of fact of the District Court:

> "The aforementioned payment obligation of $14,-250,000 was determined by the Secretary of War in

accordance with the procedures of applicable law. *Payment of this amount by the water users under their contracts will fully reimburse to the United States the capital cost of the project allocated in accordance with law to irrigation storage use.*" (Emphasis supplied) (Finding No. 7, Appendix p. 4).

It is at once obvious that the statement of the Court of Appeals that there was a subsidy cannot be reconciled with the express findings of the District Court that there is no subsidy. The Court of Appeals has never mentioned in either *Tulare I* or *Tulare II* (1) that the landowners have paid the United States $14,250,000 for the conservation storage rights in the Pine Flat Reservoir and (2) that the only credible factual finding as to the effect of that payment is that no federal subsidy is involved in this arrangement.

It is, of course, readily apparent why Judge Browning has made no reference to either of these facts in either *Tulare I* or *Tulare II*. Since the United States does not own the water with which this case is concerned, the Court of Appeals' decision can stand only if there is the premise of a federal subsidy. The finding of the District Court is that there is no subsidy. This finding should be controlling, particularly in view of the fact that neither the government nor the Court of Appeals has challenged this finding. Nevertheless, for reasons that are not explained on the record, the Court of Appeals had deliberately chosen not to mention these facts. This is not a casual oversight. It is a deliberate debasement of the appellate process by the Court of Appeals.

Not only did the Court of Appeals ignore the findings of the District Court in its rationalization that the Federal Government had the power to impose the 160-acre limitation on conservation storage but it also ignored the fact that, in *California*, this Court suggested that the Federal Govern-

ment does not have the power to interfere with a citizen's use of his irrigation water in accordance with state law:

> "Both sponsors and opponents of the Reclamation Act also expressed doubts as to Congress' power to override the States' regulation of water within their borders. Congress was fully aware that the Supreme Court had 'in several decisions recognized the right of the State to regulate and control the use of water with its borders.' ". (*California v. United States, supra,* at p. 669).

California also stands for the proposition that, assuming Congress has the power to overrule state water law, it must appear "clearly," "specifically" and "explicitly" in the language of the statute itself that Congress intended to replace state law before any court should construe a congressional enactment as having that effect. If this requirement of *California* is applied to the case at bench, the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed.

California holds that the court must look to the "congressional directive authorizing the project in question" to determine if Congress intended to usurp the application of state law to the particular project. The Pine Flat project was authorized by the Flood Control Act of 1944 by the following language:

> "The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630 . . . Provided further, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or on installments, for *conservation storage* when used . . ." (Emphasis supplied) 58 Stat. 891, 901.

This language is clear and unambiguous. Congress intended that the farmers in the Kings River service area would have the right to utilize the Pine Flat Reservoir for conservation storage provided the State of California or some other responsible agency made arrangements to pay the United States for those rights. If the State was going to pay for the conservation storage, the Congress must have assumed that it would operate the reservoir under state law. The fact that the United States chose to negotiate the payment contract with the water users rather than the State does not derogate from the fact that the authorizing statute contemplated an unconditional sale of the conservation storage rights of the Pine Flat Reservoir.

In accordance with the Act, the water users agreed to pay the United States $14,250,000 for those conservation storage rights. There is nothing in the statute authorizing the sale of the conservation storage rights which imposes any restraint upon the use of the reservoir for conservation storage once arrangements for payment had been made.

Furthermore, in construing section 8 of the 1902 Act, this Court stated in *California* ". . . it is clear that state law was expected to control in two important respects . . . second, once the waters were released from the Dam, their distribution to individual landowners would be controlled by state law" (438 U.S. at p. 665).

Under California law, the Canal Company is obligated to distribute its water to its shareholders in proportion to their respective share ownerships. *Consolidated Peoples Ditch Company v. Foodhill Ditch Company*, (1928) 205 Cal. 54. There is nothing in the language of section 10 of the 1944 Act authorizing conservation storage in the Pine Flat Reservoir which manifests any intention on the part of the Congress that the Canal Company should not follow the requirements of state law in distributing its water to its

shareholders after that water has been released from conservation storage.

Furthermore, section 10 of the 1944 Act expressly adopts the plan contained in House Document Numbered 630 (Exhibit 4 at the trial in the District Court). That document noted that "water rights in the area involved are complex and involved" (p. 4); that "Water of the Kings River is completely appropriated and is used by controlling interests in accordance with a well-established agreement administered by a water master" (p. 7); and that Pine Flat Dam "should be operated in such a manner as not to disturb existing agreements as to water use." (p. 10).

Section 10 is the controlling statute. There is nothing in the language of that Act which suggests in any way that the Canal Company should not distribute its water to its shareholders in accordance with California law when that water is released from conservation storage in the Pine Flat Reservoir. This Court noted in *California* that, in the 1944 Act, Congress recognized the primacy of state water in the use and distribution of water (438 U.S. at 678).

The problem with *Tulare I* and *Tulare II* is that the Court of Appeals was unable to grasp the premise that reclamation law applies only to water owned by the United States. If it had read section 8 of the 1944 Act as applying only to water which the United States might acquire for reclamation purposes in accordance with state law, all would be well in the realm. The litigants would praise the judicial system. The Federal Government would not be charged with intruding into a farmer's use of his irrigation water and most important of all, *Tulare I* and *Tulare II* would be consistent with *California*.

B. *Tulare II* Is Contrary to *Bryant v. Yellen, Supra.*

Bryant tendered the question of whether the Boulder Canyon Project Act (45 Stat. 1057) had the effect of imposing acreage limitations upon the lands serviced by the Imperial Irrigation District as to which the landowners held a vested water right prior to the construction of the project. The Boulder Canyon Project was authorized as a reclamation project, but section 6 of that Act provided that one of the purposes of that Act was the "satisfaction of present perfected rights". Notwithstanding that language, the Court of Appeals had held that the 160-acre limitation applied to the lands in the Imperial Valley. In order to reach this result, the Court of Appeals dreamed up a bizarre theory of California water law to the effect that the Imperial Irrigation District owned the water rights in an abstract sense in trust for all of the lands within the District and not for the benefit of any particular landowner, and therefore, reversed the District Court and held that the 160-acre limitation applied to the lands in the District. The Court of Appeals further held that the landowners did not have the right to rely upon the opinion expressed by Secretary of the Interior, Ray Lyman Wilbur, in his letter of February 24, 1933, to a lawyer for the District that the 160-acre limitation did not apply to lands as to which a vested water right existed prior to the enactment of the authorizing statute.

This Court reversed the Court of Appeals and held that the language "satisfaction of present perfected rights" expressed the intention of the Congress that the 160-acre limitation should not apply to any water rights which were vested under state law at the time the Act was passed.

In *Bryant*, the controlling language was "satisfaction of present perfected rights." Section 8 of the Flood Control Act of 1944 reads, in part, as follows:

> "Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, *but the foregoing requirement shall not prejudice lawful uses now existing*." (Emphasis supplied).

It is the position of the Canal Company that, like the comparable language in section 6 of the Boulder Canyon Project Act, the italicized portion of the foregoing quotation was intended to exclude vested water rights from any burden which might otherwise have been imposed upon a water user by virtue of section 8 of the 1944 Act.

The Court of Appeals refused to draw the analogy, stating instead that "the italicized language refers to uses to which projects operated by the Secretary of War were being put at the effective date of the 1944 Act. It refers neither to private water rights nor to projects, like Pine Flat, that were not in existence when the 1944 Act was passed" (Appendix p. 31). However, this statement is erroneous for two reasons: (1) all of the water rights in the Kings River were vested in the 28 diverting entities when the 1944 Act was passed; (2) This interpretation of the Court of Appeals renders meaningless the next clause of section 8 of the 1944 Act which reads as follows:

> "*Provided*, that this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes" (58 Stat. 891).

The foregoing quotation is an unequivocal statement by the Congress that section 8 of the 1944 Act does not apply to any flood control project as to which construction had

commenced before 1944. Therefore, the language "the foregoing requirement shall not prejudice lawful uses now existing" surely must stand for something else, since every word in a legislative enactment is presumed to have some meaning of its own.

This Court's decision in *Bryant* compels the conclusion that vested water rights are not subject to acreage limitations in the case at bench. A horizontal comparison of the relevant language of the two statutes best illustrates this point.

Section 6 of the Boulder Canyon Act	*Section 8 of the 1944 Flood Control Act*
"satisfaction of present perfected rights"	"the foregoing requirement shall not prejudice lawful uses now existing"

These two quotations are different in form but not in substance. There is no difference in "satisfying vested rights" from "not prejudicing lawful uses now existing". Each of these sentences means that vested rights were not to be affected by the project in question. The decision of the Court of Appeals is contrary to this Court's decision in *Bryant*.

Tulare II is also inconsistent with *Bryant* in its treatment of the contemporanous construction of the Act by the officials charged with enforcing. In *Bryant*, Secretary of the Interior Ray Lyman Wilbur wrote a letter dated February 24, 1933 to the Imperial Irrigation District in which he expressed the viewpoint that the 160-acre limitation would not apply to lands which had a vested water right at the time of the passage of the Boulder Canyon Project Act. The Court observed that the Imperial Irrigation District negotiated its contract with the United States based upon the opinion stated in the Secretary's letter, which was not officially repudiated by the Secretary of the Interior until 1964.

An identical situation obtains in the case at bench concerning the contemporaneous construction of reclamation law by the responsible officials charged with enforcing the Act to the effect that once one entity such as the Canal Company has paid its share of the construction costs of a project, it shall take its irrigation water free of the 160-acre limitation. However, the Court of Appeals preferred once again to ignore the findings of the trial court. It said: "Furthermore, unlike the situation in *Bryant*, neither the legislative history nor contemporaneous administrative interpretation of the statute authorizing the Pine Flat Project (the Flood Control Act of 1944) supports an exemption of the project from the 160-acre limitation (Appendix pp. 31-32). This statement of the Court of Appeals is demonstrably false. The District Court found, "The practice of extinguishing acreage limitation upon final payment by a contracting entity, whether in lump sum at the beginning of a contract period, or whenever it might occur (often referred to as the 'pay-out principle'), was according to the extensive evidence presented to this Court, the uniform practice of the Bureau of Reclamation and the Department of the Interior for 50 years" (Finding 16, Appendix p. 11). The District Court made extensive and detailed findings on the administrative practice of the Bureau of Reclamation on the payout question, which included the opinions of four Solicitors of the Department of Interior, the official statements by three successive Secretaries of the Interior and an official two volume study of the Department of Interior which was submitted to the Chairman of the Public Works and Resources Sub-Committee of the Committee on Government Operations, House of Representatives in 1956. (Findings Nos. 14-23, Appendix pp. 9-17).

Why the Court of Appeals would make the statement which it did concerning the administrative practice of the

Department of Interior in view of the record is just another one of the mysteries of the judicial process. *Tulare II* cannot be reconciled with *Bryant*, on the issue of contemporaneous construction and administrative practice.

II.
CONSTITUTIONAL ISSUES.

A. Were the Petitioners Denied Due Process of Law by Virtue of the Fact That the Court of Appeals Refused to Pass Upon the Validity of the Petitioners' Estoppel Defense Which They Had Established in the District Court?

One of the basic rights of a litigant in our judicial system is that, if he establishes a valid defense to a plaintiff's complaint, he is entitled to the protection of that defense forever more. The petitioners established the defense of estoppel in the District Court. The findings of fact of the District Court on this defense include the following:

> "24. As the evidence establishes, the Kings River water users relied upon numerous and repeated assurances made to them by the Bureau of Reclamation and the Department of the Interior that, even though acreage limitation initially applied to the irrigation use of water stored in Pine Flat Dam, such acreage limitation would no longer apply to any Kings River contracting entity after it made final payment of capital charges, such as was done by the defendant in this case. If pay-out has not the effect of extinguishing acreage limitation, the position of the Kings River water users and this defendant would be most seriously prejudiced. The Kings River water users, including the defendant herein, have expended millions of dollars and untold numbers of hours in reliance upon the Bureau's representations that pay-out would terminate acreage limitations under applicable law. . . .

"26. To permit the Government to reverse its position as to the effect of pay-out would mean that the Kings River water users paid out millions of dollars in reliance to their detriment upon a legal interpretation repeatedly reaffirmed to them by the Government and commended to them by long-standing interpretation and application of the law over the course of at least 50 years. The Court is not aware of a clearer case of substantial reliance by citizens upon the Government's contemporaneous and long-standing administrative interpretation and application of federal law, which is fully supported by the statutes enacted by Congress." (Appendix pp. 17-19).

The validity of this defense has never been denied by the Court of Appeals. It simply ignored it. No one reading *Tulare I* or *Tulare II* for that matter — would have any idea that the defense of estoppel had ever been advanced let alone established by the petitioners in the District Court. This tyranny of silence amounts to a denial of due process to the petitioners of constitutional stature.

The situation in the case at bench is no different than if the Court of Appeals had ordered the petitioners not to brief the validity of their estoppel defense and had refused to hear any argument on that issue. The Court would instantly brand judicial conduct of that stripe as a denial to the petitioners of their basic constitutional right to due process of law.

The hearing granted the petitioners by the Court of Appeals on their defense of estoppel is no different than they would have received had they mailed their briefs to Fidel Castro and argued their case in an empty room.

This Court should not permit the Court of Appeals to deny the petitioners their right to due process of law in such a blatant fashion.

B. It Is Unconstitutional for the United States to Enforce Acreage Limitations on Conservation Storage in Flood Control Reservoirs West of the 100° Meridian but Not East Thereof.

The United States stipulated in the District Court that reclamation law applies only west of the 100° meridian, and therefore, it intended to enforce the 160-acre limitation on conservation storage only on flood control reservoirs located west of the 100° meridian but not on conservation storage in any flood control district east of the 100° meridian. The effect of this stipulation is that a farmer, who stores water as to which he has a vested right in a flood control reservoir located east of the 100° meridian, may have the unlimited use of that reservoir for conservation storage free of the 160-acre limitation but that any farmer who seeks to store his privately owned water in a flood control reservoir located west of the 100° meridian will be subject to the 160-acre limitation.

This is an invidious discrimination. The situation is no different than if the federal government should attempt to levy an income tax on farmers living west of the 100° meridian but not on farmers living east of the imaginary boundary.

The government entered into this stipulation in recognition of the fact that the Congress has authorized the construction of reclamation projects only west of the 100° meridian and in further recognition of the fact that reclamation law applies only to reclamation projects. If the government would take the next step and concede that reclamation law applies only to water owned by the United States because that is what reclamation projects and reclamation law are

all about, there would be no problem.[4] However, the difficulty, and it is one of constitutional dimensions, arises when the government seeks to impose the burden of the 160-acre limitation upon conservation storage in a flood control reservoir and then applies that burden only to flood control projects west of the 100° meridian because that is where the reclamation projects are located.

Only Alice in Wonderland could understand this reasoning. Section 8 of the Flood Control Act of 1944 applies to "*any* dam and reservoir operated for flood control purposes by the Secretary of war, etc." There is no geographical limitation in that language, particularly in view of the fact that the 1944 Act authorized over 90 flood control projects in all parts of the United States.

That a flood control reservoir in California may be closer to a reclamation project than is a flood control project in Georgia is no reason to impose the 160-acre limitation upon the flood control project in California but not on the one in Georgia. Nevertheless, the Court of Appeals upheld the validity of this classification by stating:

> "The reclamation statutes are a national legislative response to climatic differences between the western region and the remainder of the nation. Provisions for acreage limitation are a reasonable means of furthering the public's purposes underlying these statutes. *Ivanhoe*, 358 U.S. at 297, *Tulare I*, 335 F.2d at 1119-20." (Appendix p. 34).

The Court does not identify the "public purposes" which the federal reclamation statutes sought to achieve, nor does it set forth any facts which justify imposing the burden of the 160-acre limitation upon some but not all farmers who are similarly situated.

---

[4]This is, of course, the teaching of *California*, *supra*.

If it is constitutional for the Federal Government to apply reclamation *law* including the 160-acre limitation upon conservation storage in one flood control reservoir, that burden should apply to all flood control reservoirs in the United States and not just flood control reservoirs located in the west. The fact that this far Congress has authorized the construction of reclamation *projects* only west of the 100° meridian is no reason for a geographical limitation upon the application of reclamation *law* if, indeed, reclamation law can ever apply to privately owned water.

The Flood Control Act of 1944 is a statute of general application to all parts of the United States. It is unconstitutional to limit the application of the conditions of that statute to only the western part of the continental United States.

C. It Is Unconstitutional for the Federal Government to Pursue a Policy of Land Reform in the West Through the Agency of the 160-Acre Limitation.

In *Tulare II*, the Court of Appeals referred only vaguely to "the public purposes" which are sought to be achieved by applying the 160-acre limitation to privately owned water. However, the Court was much more specific as to these purposes in *Tulare I* where the Court said:

> "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of the sale," 535 F. 2d at p. 1121.

Land reform is not a legitimate objective for the exercise of federal power. In *Kansas v. Colorado*, 206 U.S. 461 (1907), this Court held that the states have full jurisdiction over the lands within its borders. Furthermore, every citizen has a right to own as much land as he desires. The Federal Government has no legitimate concern with the pattern of

land ownership in any state. Therefore, the Federal Government may not execute any of its legitimate powers to endeavor to effect a policy of land reform anywhere in the United States. Any attempt by whatever federal bureaucracy may hold the reins of power at any particular time to coerce the breakup of what that particular bureaucracy might regard as excessively large land holdings is unconstitutional.

McCullough v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819);

United States v. Butler, 297 U.S. 1 (1937).

Congress did not enact the acreage limitation provisions of reclamation law in order to force the breakup of large landholdings. As originally conceived, the purpose of a reclamation project was to open up public lands for settlement. The 160-acre limitation was intended to limit the amount of federally owned land and federally owned water that the Federal Government would sell to any one settler, in order that a maximum number of citizens might be able to purchase public land and public water from the United States. The same reasoning applies to a reclamation project in which the Federal Government offers to sell only reclamation water instead of both land and water. The purpose of limiting the amount of water which any single landowner may purchase from the Federal Government is to make it possible for a maximum number of farmers to buy reclamation water from the government.

The 160-acre limitation was not intended by the Congress to be an agency of land reform in the west. The foregoing statement by the Court of Appeals suggests that the Court has been infiltrated by zealots who do not hesitate to use the enormous power of appellate review to expand the reach of the federal bureaucracy into the lives and property of the farmers in the western region of the United States in order

to achieve what they perceive to be socially desirable goals, hardly a proper judicial function.

None of the powers granted the Federal Government authorize it to embark upon a program of land reform. The only legitimate interest which the Federal Government has concerning conservation storage in the Pine Flat Reservoir or any other flood control reservoir is whether the Federal Government has been paid a reasonable sum for the use of the reservoir for that purpose. That goal was accomplished when the water users in the Kings River service area paid the United States $14,250,000 for the perpetual and exclusive use of the Pine Flat Dam for irrigation purposes. The scope of federal power does not extend beyond achieving payment.

Conclusion.

The Court should issue a writ of certiorari in this matter because of the fact that *Tulare II* is contrary to *California* and *Bryant*. Furthermore, section 8 of the 1944 Act does not authorize the broad extension of federal power to interfere with private vested water rights that is implicit in the decision of the Court of Appeals. Even if it did, such a result would be unconstitutional.

Respectfully submitted,

ROBERT M. NEWELL,
Attorney for Petitioners.

APPENDIX.
Exhibit A.

Findings of Fact, Conclusions of Law and Judgment Entered by the District Court in This Case.

The Court having issued its Memorandum and Order in this proceeding on January 6, 1972, holding that the Government's request for an injunction is denied, because reclamation laws do not apply to water stored behind the Pine Flat Dam, and if they did, pay-out relieved defendant of the 160-acre limitation, now makes its findings of fact and conclusions of law, as follows:

Findings of Fact

1. This suit was brought by the United States for an injunction against defendant, Tulare Lake Canal Company, to restrain it from delivering water stored in Pine Flat Dam and Reservoir (herein referred to as Pine Flat Dam) to lands held by a single owner in excess of 160 acres. Defendant is a California water company which delivers to its stockholders, through canals and works owned by it, Kings River water appropriated under vested, nonappurtenant water rights for use in irrigation. The lands owned by defendant's stockholders and served by defendant are located within the Tulare Lake Basin, hereafter described. Defendant admits that it has delivered, and unless the law forbids will continue to deliver, water stored in Pine Flat Dam to its stockholders for the irrigation of lands in excess of 160 acres in single ownership. Defendant is one of 28 entities which have contracted with the United States for the exclusive and perpetual storage use of Pine Flat Dam for irrigation purposes, such contracts in the aggregate exhausting the entire capacity of Pine Flat Dam for the storage of water for irrigation purposes.

2. Intervenor defendants in the proceeding are Tulare Lake Basin Water Storage District and Salyer Land Com-

pany. The former is one of the 28 contracting entities referred to and the latter owns and operates for agricultural purposes lands in excess of 160 acres within the Tulare Lake Basin. A brief *amici curiae* was presented jointly in behalf of Alta Irrigation District, Fresno Irrigation District, Consolidated Irrigation District, Kings River Water District, Laguna Irrigation District (all Kings River contracting entities) and Kaweah Delta Water Conservation District, Lower Tule River Irrigation District and Tule River Association (entities interested through their participation in similar projects on the Kaweah and Tule Rivers).

3. Pine Flat Dam was constructed on the Kings River in California, about 25 miles easterly of the City of Fresno, and was completed in 1954. Pine Flat Dam was constructed and is, and always has been, operated by the Army Engineers pursuant to Section 10 of the Flood Control Act of 1944 (58 Stat. 891, 901). Pine Flat Dam, as determined by Congress, is primarily for flood control purposes but with important incidental irrigation uses. In 1963 the 28 Kings River entities entered into the contracts with the United States, previously referred to, by which they obtained for the first time a contractual right for the permanent use for irrigation storage purposes of Pine Flat Dam. In return, the 28 contracting entities paid, or agreed to pay, the cost of Pine Flat Dam allocated to irrigation uses, as determined by law, in the total amount of $14,250,000. Under these contracts, the 28 entities also agree to pay, and have paid, $750,000 to the United States for a conveyance, and the United States has conveyed to said entities as tenants in common, "for irrigation purposes and other beneficial agricultural uses free and clear of all encumbrances of every name and nature, any and all right, title, or interest [the United States] now has or claims to have in and to the water of Kings River," as set forth in Conveyance and Covenants

in Compromise and Settlement of Fresno Slough Claims, No. 14-06-200-699-A.

4. Defendant, as one of the 28 contracting entities, entered into Contract No. 14-06-200-691-A with the United States on December 23, 1963. Simultaneously with the execution of said contract, defendant paid to the United States the entire balance owed by it for such irrigation storage rights and for the conveyance of the United States' claims to Kings River water for irrigation uses, referred to in the preceding paragraph.

5. By its contract, including specifically Article 8(e) thereof, defendant assumed no obligation with regard to the delivery of stored water to lands held in excess of 160 acres in single ownership unless and to the extent that such obligation was required by the then-existing laws of the United States. It is the Government's contention in this proceeding that said laws apply general reclamation law, and specifically Section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 649, 43 U.S.C. § 423e), to the irrigation use of Pine Flat Dam and do forbid the delivery of stored water to such so-called excess lands. It is defendant's contention, in which the intervenors and *amici curiae* join, that the laws of the United States contain no requirement that general reclamation law is applicable to the irrigation storage use of Pine Flat Dam. Further, it is defendant's contention, in which intervenors and *amici curiae* join, that even if the so-called acreage limitation of reclamation law did initially apply to the irrigation storage use of Pine Flat Dam, that limitation was extinguished as to defendant when, on December 23, 1963, it completed payment to the United States of its entire share of the capital cost of Pine Flat Dam. The United States, in turn, denies that such pay-out has this effect.

6. The case was tried in Fresno during the period extending from Tuesday, May 4, 1971, to Friday, May 14, 1971, both inclusive. Twelve witnesses testified in person in behalf of defendant, and two witnesses testified by deposition in behalf of defendant and intervenor Tulare Lake Basin Water Storage District. Various stipulations of fact were entered into by the parties and approved by the Court. No witnesses appeared for the United States. Over 700 documentary exhibits were received in evidence. Following extensive briefing by all parties and *amici curiae*, oral argument was held before the Court on September 2, 1971.

7. Prior to 1944, both the Army Engineers and the Bureau of Reclamation had made studies of the proposed Pine Flat Dam project and submitted them to the Congress. The Congress decided in favor of having the project built and operated by the Army Engineers, and Section 10 of the 1944 Act expressly referred to and adopted the report of the "Secretary of War and the Chief of Engineers," said report being referred to as House Document Numbered 630, Seventy-Eighth Congress, Third Session. The adoption of the report was subject to only one limitation, not pertinent here. No proposal for or mention of the application of reclamation law or acreage limitation to Pine Flat Dam was contained in this report adopted by Congress. Section 10 of the 1944 Act further expressly provided that payment for irrigation uses should be arranged for by the Secretary of War, payment to the United States to be made "either in lump sum or annual installments". The aforementioned repayment obligation of $14,250,000 was determined by the Secretary of War in accordance with the procedures of applicable law. Payment of this amount by the water users under their contracts will fully reimburse to the United States the capital costs of the project allocated in accordance with law to irrigation storage use.

8. The report of the Army Engineers informed the Congress that all of the waters of the Kings River available for irrigation purposes were fully appropriated by the water users; that they had developed approximately 850,000 acres in the Kings River service area with their own private funds; and that they had built and owned a complete system of canals and other works which were used for distribution of water diverted from Kings River for irrigation purposes. The Army Engineers expressed the view that the project was primarily for flood control, with incidental, although important, irrigation benefits, consisting of capacity for the storage of water to be used for irrigation. The Bureau of Reclamation's report to Congress recognized that no new lands would be developed by the construction and operation of the project, and the House Flood Control Committee Report found that irrigation benefits from the project "would accrue to land now already developed without bringing into production additional arid land".

9. In the Congressional hearings many Kings River water users testified, supporting the report of the Army Engineers in preference to that of the Bureau of Reclamation. Among the many facts developed, the testimony showed that about 200,000 acres at the southern limit of the Kings River service area, known as the Tulare Lake Basin, were subject to periods of extensive flood and to other periods of intensive drought; that well water was not available in important areas of the Basin for either irrigation or domestic uses; that the Basin contained practically no dwellings for residential purposes; that water conditions in the Basin were suitable for large-scale farming operations, but not for permanent farm homes; and that subdivision and settlement of the area would be hazardous and unwise. At the time of the June, 1943, hearings, it was pointed out to the Congress that 112,000 acres of the Tulare Lake Basin

were then flooded, to an average depth of 14.5 feet. Testimony by the Commissioner of Reclamation recognized "there is no water to be developed . . . our studies indicate that the complete normal run-off . . . [is] now under State law allocated to individuals and agencies in the region, and we cannot interfere with that".

10. The evidence at the trial supports the various factual statements set forth in the report of the Army Engineers, the report of the Bureau of Reclamation and in the testimony before the congressional committees, as and to the extent outlined in Paragraphs 8 and 9, above, and the Court hereby finds accordingly. These factors influenced the Congress in enacting the Flood Control Act of 1944 and thereby authorizing Pine Flat Dam as a flood control rather than a reclamation project. Further, the evidence at the trial compels the finding that the situation, above described, continues to exist at the present time. That is, the project is primarily a flood control project; the United States has conveyed to the water users any and all right, title or interest it had or claimed to have in and to the water of Kings River, as set forth above in Finding No. 3, and Pine Flat Dam has not developed any new or supplemental water supply which can be sold by the United States; all rights to the use of Kings River water for irrigation purposes and other beneficial agricultural uses are vested in the local water users; arid lands have not been reclaimed within the Kings River service area as the result of the construction and operation of Pine Flat Dam; the lands have been developed and the complete distribution system of canals and ditches are owned by the local water users; no canals, ditches or other distribution works have ever been built by the United States or with any federal assistance; and because of flooding, drought, soil conditions and inadequate domestic and irrigation water supplies, the 200,000 acres known as the Tulare

Lake Basin are not adaptable to actual settlement by family farmers in 160-acre or 320-acre parcels as contemplated by the federal reclamation laws. The evidence shows that even at the time of trial in May, 1971, some 27,000 acres of Tulare Lake Basin were yet under flood waters remaining from the massive inundation of 89,000 acres during the 1968-1969 run-off season and that, in addition to substantial crop loss and flood fighting expense, further substantial costs were yet to be incurred in bringing such land back into production. Earlier, in the 1966-67 run-off season, another substantial flood struck Tulare Lake Basin. Two other instances of flooding in Tulare Lake Basin have occurred since Pine Flat Dam was completed in 1954. The Government's contention that reclamation law is applicable because of the irrigation benefits provided by Pine Flat Dam to the water users in the service area is without merit.

11. Officials of the Bureau of Reclamation in California concluded in studies and recommendations, completed in 1947, that it was not feasible to attempt to apply the acreage limitation provisions of reclamation law to the Tulare Lake Basin. The United States did not contend in this proceeding, and never has contended, that reclamation law and acreage limitation were intended by Congress to apply to some parts of the Kings River service area and not to other parts. It contends, as does defendant, that Congress intended the same law to apply to the entire area.

12. Contrary to the Government's contention that the language of Section 8 of the Flood Control Act of 1944 (58 Stat. 891), supported its legislative history, requires the application of reclamation law to Pine Flat Dam, the Court finds that Congress intended that Section 8 of the Flood Control Act of 1944 (58 Stat. 891) make reclamation law and the acreage limitation prescribed by reclamation law applicable to Flood Control projects only where a new or

supplemental water supply would be developed by the project which would be owned and could be sold by the United States for irrigation purposes through canals and ditches constructed by the Bureau of Reclamation; and Congress did not intend to make reclamation law or the acreage limitation prescribed by reclamation law applicable to projects authorized and constructed under said Flood Control Act of 1944, consisting of dam and reservoir projects constructed by and operated under the direction of the Secretary of War, unless and until: (a) the Secretary of War has determined upon recommendation by the Secretary of the Interior that such a project might be utilized for irrigation purposes; (b) the Secretary of the Interior has made a report and finding that additional works in connection with such project are necessary for irrigation purposes; and (c) there has been specific authorization of such additional works by an authorization act of Congress. The Court finds further that no new or supplemental water supply has been or is to be developed by Pine Flat Dam which can be sold by the United States; that no water stored in Pine Flat Dam has been or is to be delivered for irrigation purposes through canals and ditches constructed by the Bureau of Reclamation; that the Secretary of the Interior has made no recommendation, as contemplated by Section 8 of the 1944 Act, regarding the utilization of Pine Flat Dam for irrigation purposes and no determination based upon any such recommendation has been made by the Secretary of War; that the Secretary of the Interior has not made any report and finding that additional works in connection with Pine Flat Dam are necessary for irrigation purposes; that there has been no authorization of any such additional works by any authorization act of Congress; and that said Section 8 of the Flood Control Act of 1944 does not make reclamation law applicable to the Pine Flat Dam project. The Court further

finds that the irrigation use of said project was prescribed by Congress in Section 10 of said Flood Control Act of 1944.

13. Althouth Section 10 of the 1944 Act directed the payment for conservation storage in Pine Flat Dam be arranged by the Secretary of War, the payment contracts between the United States and the Kings River water users were negotiated by the Bureau of Reclamation pursuant to a directive from the President of the United States. This directive, however, could not, and did not, change the law applicable to the project as provided by Congress. In 1967, in connection with certain legislation pertinent to the Kings River, the Senate Committee on Interior and Insular Affairs observed in Senate Report No. 837, Ninetieth Congress, First Session:

> "The Secretary of the Interior was not 'delivering water' and, in fact, did not even have a project. The Kings River people owned the water and the Corps of Engineers constructed and operated dam and reservoir. The Department of the Interior was merely the contracting agency for the United States . . ."

The evidence at the trial supports the foregoing statements of the Senate Interior and Insular Affairs Committee, and the Court so finds.

14. The following findings are concerned in particular with the second issue in the case: Whether, even assuming that reclamation law and the 160 acre limitation initially applied to the irrigation use of Pine Flat Dam and the lands served by defendant with "stored water," payment in full of defendant's capital obligation with respect to Pine Flat Dam, which occurred on December 23, 1963, extinguished the application of the acreage limitation with respect to the land served by defendant. In regard to this issue, it was defendant's contention that final payment in full of the re-

payment obligation of a contracting entity for the irrigation benefits of a project whether in lump sum at the beginning of a contract period or whether it might occur, relieved that entity from the excess land provisions of federal reclamation law. Plaintiff, however, contended that advance payment in full of the repayment obligation of a contracting entity for the irrigation benefits of a given project does not relieve that entity from the excess land provisions of federal reclamation law. The findings which follow this statement and support defendant's contention on this issue should be read in connection with the preceding findings.

15. Plaintiff contended that Section 3 of the Act of August 9, 1912 (37 Stat. 266, 43 U.S.C. Section 544) did not modify what it conceives to be the basic objective of the excess land provisions of federal reclamation law. Said Section 3 provides in part as follows:

> That no person shall . . . acquire, own, or hold irrigable land for which entry or water rights application shall have been made under the said reclamation act of June seventeenth nineteen hundred and two and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior, as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition;

The Court finds and so rules that said Section 3 expressly limits the acreage limitation provisions in Section 5 of the

Reclamation Act of June 17, 1902 (32 Stat. 387) to the period before "final payment in full" of the pertinent contractual repayment obligations relating to an irrigation project. This provision was interpreted by Chief Counsel King, of the Bureau of Reclamation in his opinion of July 1, 1914 (43 L.D. 339), to "permit the furnishing of water for land on which payment in full has been made of building and betterment charges even when more than 160 acres of such land is owned by one person." This provision and interpretation were consistent with the 1902 Act, and were carried forward in subsequent acts such as Section 13 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 690, 43 U.S.C. Section 443).

The King opinion was promptly accepted and promulgated by the Department of the Interior. It was subsequently incorporated into Interior regulations in 1920 (27 L.D. 418), where it remains to this date (43 C.F.R. Section 230.65).

16. The practice of extinguishing acreage limitation upon final payment by a contracting entity, whether in lump sum at the beginning of a contract period, or whenever it might occur (often referred to as the "pay-out principle"), was according to the extensive evidence presented to this Court, the uniform practice of the Bureau of Reclamation and the Department of the Interior for 50 years. On December 26, 1961, for the first time, that practice was held unlawful by an opinion of the then Solicitor of the Department of the Interior (68 I.D. 374). Thereafter, by contracts with the Kings River water users, the United States agreed to submit for binding judicial determination the issue of whether the laws of the United States require the application of acreage limitations in the circumstances presented by this case.

17. In the course of the hearings on the Kings River Project leading to enactment of the Flood Control Act of

1944, the Commissioner of Reclamation acknowledged to Congress that the jurisdiction of the Bureau of Reclamation over the distribution of irrigation water would terminate upon the completion of pay-out. During the period 1945 through early 1961, four Solicitors of the Department of the Interior held that full repayment by a contracting entity terminates the application of acreage limitation to that entity [Fowler Harper's Memorandum opinion of August 21, 1945; Associate Solicitor Cohen's opinion (M-35004), October 22, 1947; Solicitor Elmer Bennett's opinion (M-36457), July 10, 1957 and Memorandum of October 17, 1957; Solicitor Theodore Stevens' opinion (M-36611), January 3, 1961]. Two of the Solicitors' opinions (Bennett and Stevens) related specifically to the Pine Flat Dam project. In addition, statements by three successive Secretaries of the Interior also confirmed the pay-out principle to Congress and the Kings River water users [e.g., Secretary Chapman, November 2, 1950; Secretary McKay, March 2, 1954; Secretary Seaton, July 12, 1957, October 27, 1957]. The earliest of these, by Secretary Chapman in 1950, represented to Congress that the pay-out principle was incorporated into the 1944 Flood Control Act's authorization of the Pine Flat project by the provision in Section 10 for repayment for conservation storage benefits in "lump sum or annual installments".

18. In 1956 the Department of the Interior prepared and submitted to the Chairman of the Public Works and Resources Subcommittee of the Committee on Government Operations, House of Representatives of the Congress of the United States, a two-volume study entitled "Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges." This study related expressly to the Pine Flat Dam and the Kings River water users. It was addressed to the legality under reclamation law of a draft

contract with the Kings River water users which provided for release of acreage limitations upon final pay-out of the capital charges allocated to the water users. The study, transmitted to the congressional subcommittee by the Under Secretary of the Interior, traced the practice of the Bureau and Department with respect to the pay-out doctrine from 1902 to 1956. The study included numerous exhibits verifying the practice stated and the conclusions reached. The final paragraph of the Department's summary statement, extending from pages 1 to 56, both inclusive, of volume one of the study, concludes as follows at page 56:

> The proposal contained in the repayment contract arrangement negotiated with the Kings River Conservation District is simply that when and to the extent construction charges repayable under that contract are paid to the United States, the lands with respect to which full payment is made will no longer be subject to the excess land limitation of the federal reclamation laws. Development of this phase of the proposed contract constitutes the application of a principle which is consistent with a policy of long standing and which is compatible with the construction of Acts of Congress as they have been interpreted by administrative officials and legal staffs of the Department over a long period of years.

Volume two of the 1956 Study presented to Congress contains numerous letters and correspondence from the Department of the Interior pertaining to the determination and assurances that pay-out by Kings River contracting waters users terminates application of acreage limitations. Furthermore, the evidence of record contains numerous other documents of the same nature issued by the Department up to and including the year 1961.

19. The draft contract with the Kings River water users incorporated in the study provided for the extinguishment of acreage limitation upon complete pay-out by the contracting entity or by a landowner. In the latter situation, final payment by the landowner consisted of the capital charges applicable to his land. The contract between the United States and the defendant of December 23, 1963, involves final payment by the contracting entity, itself, which payment, as previously stated, was made, in full, on December 23, 1963. The above-quoted statement of the Department of the Interior in paragraph 18 covers conclusively the principle of pay-out and release of acreage limitation involved in the defendant's contract of December 23, 1963.

20. This study and the views expressed therein endorsing the pay-out principle were widely disseminated by the Department of the Interior when presented to Congress in 1956. Congress did not reject this interpretation of reclamation law, but, to the contrary, it enacted general reclamation legislation, the Small Reclamation Projects Act of 1956 (70 Stat. 1044, 43 U.S.C. § 4223), based upon and expanding the principle by providing that payment of the capital component, or of interest thereon, attributable to excess lands on a project completely displaces the application of acreage limitation to such lands. Congress had also recognized in the Russian River project authorization of the Flood Control Act of 1950 (64 Stat. 170) that lump sum payment for irrigation benefits obviated the application of acreage limitation to excess lands in a project coming within the provisions of Section 8 of the Flood Control Act of 1944.

21. The record contains an enormous amount of evidence, in addition to the 1956 Study, verifying the Department of the Interior's consistent practice on reclama-

tion projects of recognizing that acreage limitation terminates upon final payment of capital charges. A Bureau of Reclamation survey report on landownerships on federal reclamation projects and laws applicable thereto published in 1946 verifies that the pay-out principle was consistently recognized in the administration of reclamation projects constructed prior to the enactment of the Flood Control Act of 1944. The parties have stipulated as to the existence and as to the pertinent pay-out provisions contained in some 100 contracts on numerous reclamation projects, verifying this practice. Many of these contracts were specifically approved by Congress pursuant to Section 7(c) of the Reclamation Project Act of 1939 (53 Stat. 192, 43 U.S.C. § 485f). The plaintiff, however, contended that no instances were shown of actual advance lump sum pay-out, but the court finds that this attempted distinction is of no significance and that under the rationale for the practice, it is immaterial whether full payment is made at the outset or at a later time.

22. Moreover, the Court notes that the Government, in response to one of defendant's interrogatories, states that it knew of no instance where final payment of construction charges allocated to irrigation benefits had been made and acreage limitation had continued to be thereafter enforced. Similarly, the Court was advised of no instance wherein final payment, in lump sum or on an accelerated basis, had been refused by the United States. As to the latter, in any case, the Court has noted that Section 10 of the 1944 Act, applicable to Pine Flat Dam, expressly authorizes "lump sum" payment, and full payment has been made to the United States by the defendant, Tulare Lake Canal Company.

23. The 1959 report of the Committee on Interior and Insular Affairs of the House of Representatives, the committee of the House having cognizance over reclamation

matters, on the bill which authorized the so-called San Luis project in California, House Report No. 399, Eighty-Sixth Congress, First Session, referred to the pay-out rule as documented in the aforementioned 1956 Study presented to Congress pertaining to Kings River and Pine Flat Dam and as applied theretofore, in the following terms:

> "During the period when irrigation water contracts were entered with individuals rather than organized disticts, it is thus clear that the law forbade delivery of water to no more than one farm unit held by an individual only so long as the entire construction cost allocated to the excess unit had not been paid in full. That the law was so read and applied by the Interior Department as shown in detail in the Bureau of Reclamation's printed publication entitled "Landownership Survey on Federal Reclamation Projects" (1946) and the Interior Department's two-volume document prepared for the Subcommittee on Public Works and Resources of the House Committee on Government Operations entitled "Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges" (1956).
>
> "The same rule has been held to be applicable to irrigation district contracts . . .
>
> "The present Secretary of the Interior has, in effect, announced his concurrence in this view of the law. On July 12, 1957, he said . . .
>
> 'The Department continues to recognize and support the basic concept of reclamation law that full and final payment of the obligation of a district to the Federal Government ends the applicability of the acreage limitations—
>
> and added—
>
> 'So long as the present acreage limitations remain in the basic reclamation law, they should be com-

plied with, until the district has fully discharged its obligations to the Federal Government.'

". . . Whatever may be the merits or demerits of continuing to apply the prevailing construction of the 1912 and 1926 acts to irrigation districts in situations in which, although final payment is made only after a period of years during which they received the benefits of interest-free Federal money and, in many cases, assistance from power revenues, it remains true that (1) the administrative practice of doing so is now so well fortified by history that it can probably be successfully attacked by no one except Congress and (2) that there is no legislation now pending before Congress, nor has any ever been introduced, which would overrule the departmental interpretation of these acts or provide other standards to guide it."

The Court adopts the foregoing committee statement as a finding fully supported by the evidence in this proceeding.

24. As the evidence establishes, the Kings River water users relied upon numerous and repeated assurances made to them by the Bureau of Reclamation and the Department of the Interior that, even though acreage limitation initially applied to the irrigation use of water stored in Pine Flat Dam, such acreage limitation would no longer apply to any Kings River contracting entity after it made final payment of capital charges, such as was done by the defendant in this case. If pay-out has not the effect of extinguishing acreage limitation, the position of the Kings River water users and this defendant would be most seriously prejudiced. The Kings River water users, including the defendant herein, have expended millions of dollars and untold numbers of hours in reliance upon the Bureau's representations that pay-out would terminate acreage limitations under applicable law.

25. For example, beginning in early 1954 and continuing through 1963, the Kings River water users availed themselves of the storage facilities of Pine Flat Dam for irrigation purposes under annual interim contracts. Under such contracts, the water users, including defendant herein, paid amounts for water storage far exceeding the operation and maintenance costs allocated to irrigation use. The water users, including defendant herein, were allowed credits toward the $14,250,000 capital cost repayment obligation for the amounts paid under these interim contracts in excess of annual operation and maintenance costs allocated to irrigation use, but these credits were contingent upon their ultimate execution of permanent contracts. The credits amassed through 1963 amounted to $6.8 million, or almost one-half of the total repayment obligation for irrigation storage use of Pine Flat Dam. Therefore, the water users were in the position of having paid almost half of the capital cost obligation for the acquisition of permanent storage rights in Pine Flat Dam in reliance upon assurances that the use of those rights would not be subject to acreage limitations after the balance of their respective shares of the capital cost obligations had been fully repaid. Had the water users foregone the irrigation storage use of the Dam after the Department of the Interior disavowed the applicability of the pay-out principle, they would have forfeited these substantial payments already made toward permanent storage rights.

26. To permit the Government to reverse its position as to the effect of pay-out would mean that the Kings River water users paid out millions of dollars in reliance to their detriment upon a legal interpretation repeatedly reaffirmed to them by the Government and commended to them by long-standing interpretation and application of the law over the course of at least 50 years. The Court is not aware of

a clearer case of substantial reliance by citizens upon the Government's contemporaneous and long-standing administrative interpretation and application of federal law, which is fully supported by the statutes enacted by Congress.

27. All of the findings of fact set forth in the Court's Memorandum and Order of January 6, 1972, are incorporated herein to the extent not above included.

Conclusions of Law

1. Section 10 of the Flood Control Act of 1944 authorizes Pine Flat Dam to be constructed and operated by the Army Engineers under supervision of the Secretary of War [now Army] for flood control and other purposes, including irrigation storage use, and does not direct or authorize the application of federal reclamation law or the 160-acre limitation to the irrigation storage use of that facility.

2. It is infeasible and would produce bizarre and absurd consequences if an attempt were made to impose acreage limitation and family-farm settlements within the Tulare Lake Basin.

3. The Laws of the United States, and particularly Section 8 of the Flood Control Act of 1944, do not make federal reclamation law applicable to a dam and reservoir project authorized by said Flood Control Act and operated under the direction of the Secretary of War unless and until: (a) the Secretary of War has determined upon recommendation by the Secretary of the Interior that such a project might be utilized for irrigation purposes; (b) the Secretary of the Interior has made a report and finding that additional works in connection with said project are necessary for irrigation purposes; and (c) there has been specific authorization of such additional works by an authorization act of Congress. None of the foregoing conditions having been satisfied, Federal reclamation laws, including the acreage limitation

provisions thereof, have no application to the irrigation storage use of Pine Flat Dam.

4. Federal reclamation laws provide an example of the type of legislation, comprising numerous separate enactments over a period of many years, which must be read as a composite whole. A later enactment does not supersede an earlier enactment unless Congress has expressed its intent to this effect or unless there is a necessary conflict between the later and earlier enactments. Section 3 of the Act of August 9, 1912, and other provisions of statute law recognizing that acreage limitation terminates upon final pay-out of capital costs by a contracting entity are not in conflict with Section 46 of the Omnibus Adjustment Act of May 25, 1926, or any other reclamation law. Federal reclamation laws, even if applicable, do not apply acreage limitation after an entity contracting with the United States completes full and final payment of its contractual obligation for reimbursable capital costs allocable to irrigation benefits.

5. Administrative interpretation and application by the agency charged by Congress with the administration of a pertinent law, particularly, as here, where such administrative interpretation is contemporaneous with the enactment of the statute involved and the application of that interpretation is thereafter uniform and long-continued, are entitled to great weight by the federal judiciary. An administrative agency may not reverse itself and change such interpretation and application unless the statute plainly does not admit of the interpretation and application previously given it. These principles of law apply with peculiar force in a situation, such as the present one, where citizens have relied at vast expenditure of money and time upon repeated Government assurances of the correctness of its interpretation and administration of the acts of Congress involved, and where Con-

gress, both by acceptance and affirmative action, has repeatedly approved such interpretation and administration.

6. The laws of the United States, as of December 23, 1963, the date of Contract No. 14-06-200-691-A between defendant and the United States for irrigation storage rights in Pine Flat Dam, did not prohibit, and have not prohibited at any time thereafter, the delivery of stored water from Pine Flat Dam to the excess lands of a large landowner who has not executed a recordable contract under federal reclamation law.

7. Pursuant to Article 8(e) of Contract No. 14-06-200-691-A, all the provisions of Article 8 of said contract, purporting to impose a prohibition against defendant's delivery of stored water from Pine Flat Dam to excess lands of a large landowner who has not executed a recordable contact, are void *ab initio* and of no effect.

8. All of the conclusions of law set forth in the Court's Memorandum and Order of January 6, 1972, and in the foregoing findings of fact, are incorporated herein to the extent not above included.

9. Plaintiff is not entitled to the injunction prayed for in its complaint. Defendant and intervenors are entitled to judgment in their favor.

Dated: Mar. 15, 1972.

M. D. CROCKER
United States District Judge

Exhibit B.

Opinion.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Respondent, v. Tulare Lake Canal Company, a corporation, Defendant-Petitioner, Tulare Lake Basin Water Storage District and Salyer Land Company, a corporation, Intervenors-Defendants. No. 72-2322.

United States of America, Plaintiff-Appellee, v. Tulare Lake Canal Co., a corp., Defendant, and Tulare Lake Basin Water Storage District, Intervenor-Defendant, and Salyer Land Co., a corp., Intervenor-Defendant-Appellant. No. 78-1378.

United States of America, Plaintiff-Appellee, v. Tulare Lake Canal Co., a corp., Defendant-Appellant, and Tulare Lake Basin Water Storage District, Intervenor-Defendant-Appellant, and Salyer Land Co., a corp., Intervenor-Defendant. No. 78-1422, D.C. No. CV 2483 ND.

Filed: May 17, 1982.

Appeal from the United States District Court for the Eastern District of California, Honorable M.D. Crocker, District Judge, Presiding. Argued and Submitted November 13, 1980.

Before: BROWNING, Chief Judge, DUNIWAY and WALLACE, Circuit Judges.

BROWNING, Chief Judge:

The basic question presented by this lengthy litigation is whether acreage limitations imposed by the federal reclamation laws apply to private lands receiving irrigation benefits from the Pine Flat Project. More specifically, the question is whether owners of more than 160 acres of land within the project area must execute recordable contracts to sell

their land in excess of 160 acres at a price excluding incremental value resulting from the existence of the project in order to receive water that would not have been available if the project did not exist. The relevant legal and factual questions are explored in detail in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1094-96 (9th Cir. 1976) (*Tulare I*) (No. 72-2322).

The United States brought this action in 1963, seeking an injunction enforcing the acreage limitation. The defendants raised both statutory and constitutional defenses. The district court found for defendants on the statutory grounds and did not reach the constitutional questions. 340 F. Supp. 1185, 1188 (E.D. Cal. 1972). In *Tulare I*, we reversed the district court judgment and rejected defendants' statutory defenses. On remand, the district court granted the government's motion for summary judgment on the constitutional issues. Defendants appeal from that ruling in Nos. 78-1378 and 78-1422.

Defendant Tulare Lake Canal Company has also filed a "Petition for the Court to Recall its Mandate" in *Tulare I* based on the Supreme Court's subsequent decisions in *California v. United States*, 438 U.S. 645 (1978), and *Bryant v. Yellen*, 447 U.S. 352 (1980).

I. *The Statutory Issues: Petition to Recall the Mandate in No. 72-2322*

Tulare argues that it is appropriate to recall the mandate in *Tulare I* because the decision is "demonstrably wrong," *American Iron & Steel Institute v. Environmental Protection Agency*, 560 F.2d 589, 594 (3d Cir. 1977), in light of the decisions in *California* and *Bryant*. A change in controlling authority or a conviction that the court erred are ordinarily not alone sufficient grounds for recall of a mandate after final judgment. 16 Wright, Miller, Cooper & Gressman,

Federal Practice and Procedure: Jurisdiction § 3938 at 284-85. However, since final judgment has not been entered in this case, we consider the effect of *California* and *Bryant* on *Tulare I* under the more flexible "law of the case" doctrine. *Kimball v. Callahan*, 590 F.2d 768, 771-72 (9th Cir. 1979). We conclude that neither *California* nor *Bryant* affects the soundness of *Tulare I*.

A. *California v. United States*

As noted at the outset, the question presented in *Tulare I* was whether the acreage limitation of federal reclamation law applies to the Pine Flat Project. As the issue was presented in *Tulare I*, the answer turned upon the meaning of the statutes authorizing the project and imposing the acreage limitation. The Pine Flat Project was authorized by the Flood Control Act of 1944, 58 Stat. 887, 901. Section 8 of the 1944 Act provides that dams such as Pine Flat shall be operated "under the provisions of the federal reclamation laws." 58 Stat. 887, 891; 43 U.S.C. § 390. Among the provisions o the federal reclamation laws is Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 636, 649-50, 43 U.S.C. § 423e, derived from Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431. Section 46 of the 1926 Act provides that lands in excess of 160 acres held by one owner shall not receive water made available by the construction of a project unless the owner executes a contract agreeing to sell the excess land at prices reflecting the value of the excess land without the benefits made available by the project. We held in *Tulare I* that Congress intended by Section 8 of the Flood Control Act of 1944 to make Section 46 of the Omnibus Adjustment Act of 1926 applicable to the Pine Flat Project.

The question presented in *California* was whether the state may impose conditions upon the appropriation and

distribution of water in connection with the New Melones Dam, a federal reclamation project in the Central Valley of California. The answer turned on the meaning of Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383, which states that the 1902 Act was not intended to interfere with the laws of any state relating to the appropriation or distribution of water, and that the Secretary of Interior is to proceed in conformity with such laws. The Supreme Court held that, in view of Section 8 of the 1902 Act, the state may impose any condition on the appropriation and distribution of water in a federal reclamation project not inconsistent with Congressional directives respecting the project.

Although Section 8 of the 1902 Act is applicable generally to federal reclamation projects, including the Pine Flat Project, and the holding in *California* is therefore applicable to Pine Flat, the issue resolved in *California* obviously was not the same as the issue resolved in *Tulare I*. Tulare Lake Canal Company argues that *California* nonetheless affects *Tulare I* for two reasons.

The first is that *Tulare I* relied upon *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), and *California* expressly rejected a dictum from the *Ivanhoe* opinion. The language in *Ivanhoe* that was disapproved in *California* suggests that a state may not impose conditions upon the distribution of water through a federal reclamation project even though the conditions "are not inconsistent with congressional provisions authorizing the project in question." 438 U.S. at 674. This language in *Ivanhoe* was disapproved in *California* because *California* held that a state *could* impose upon the distribution of water through a federal reclamation project any condition that was not inconsistent with Congressional directives for the project.

Tulare I did not rely upon the dictum disapproved in *Ivanhoe*. *Tulare I* relied instead upon the holding in *Ivanhoe*, a holding expressly reaffirmed in *California*. Section 5 of the Reclamation Act of 1902 contains an acreage limitation provision — the forerunner of the acreage limitation in Section 46 of the Omnibus Adjustment Act of 1926, involved in *Tulare I*. The holding in *Ivanhoe* was that despite the general command of Section 8 of the Reclamation Act of 1902 that the Secretary of Interior comply with state law, the acreage limitation in Section 5 of the 1902 Act preempted the law of California prohibiting such an acreage limitation. 357 U.S. at 291-93. In *California* the Supreme Court expressly reaffirmed this holding. 438 U.S. at 668 n.21, 672 & n.25. We relied upon this holding, or upon other aspects of *Ivanhoe* unrelated to the disapproved dictum, each time we cited *Ivanhoe* in *Tulare I*. *See* 535 F.2d at 1099, 1112, 1113 n.74, 1119, 1120, 1121 n.103, and 1137 n.176.

Second, Tulare Lake Canal Company argues that even if the holding of *California* is not inconsistent with *Tulare I*, the rationale is. The Company argues that the general tenor of *California* requires greater deference to state law in the management of federal reclamation prospects, and since California law prohibits acreage limitations in the distribution of irrigation benefits, the decision in *Tulare I* that the acreage limitation in Section 46 of the 1926 Act applies to the Pine Flat Project despite contrary state law is somehow inconsistent with *California*. But, as noted, *Ivanhoe* expressly held that the acreage limitations in section 5 of the 1902 Act pre-empt contrary California law, and *California* expressly reaffirmed this holding. The company does not state, and we are unable to discover, any reason why the acreage limitation in Section 46 of the 1926 Act should have a different effect.

Tulare Lake Canal Company reads *California* as requiring that state law be followed unless it conflicts with "a 'clear,' 'specific,' or 'explicit' Congressional directive," and argues that the length of the discussion of legislative history in *Tulare I* "alone demonstrates that Congressional intent to that effect certainly was not 'clear,' 'specific,' or 'explicit.' " There can be no doubt that the Congressional directive to impose the acreage limitation is sufficiently clear, specific, and explicit to pre-empt state law. That is the holding of *Ivanhoe* that was reaffirmed in *California*. Our lengthy discussion in *Tulare I* was directed to another question: whether Congress in the Flood Control Act of 1944 intended to apply this clear, specific, and explicit federal directive to the Pine Flat Project. *California* has no relevance to this question at all. And even on this question we found the answer clear. After a thorough examination we concluded that "[t]he legislative history leaves no doubt that the 160 acre limitation was intended to apply in the Kings River service area." 535 F.2d at 1098.

In sum, although *California* does require that the United States follow state water law absent a pre-empting federal statute, the same case shows that section 46 of the 1926 Act is precisely such a statute. *California* strengthened rather than weakened the conclusion we reached in *Tulare I*.

B. *Bryant v. Yellen*

The question presented in *Bryant* was whether the Imperial Valley Irrigation District, which received Colorado River water from the project authorized by the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. §§ 617-617u, was subject to the acreage limitation in Section 46 of the Omnibus Adjustment Act of 1926. Since Section 14 of the Boulder Canyon Project Act provided that the reclamation laws would apply "except as otherwise herein provided,"

the Court concluded that Section 46 of the 1926 Act applied to the Imperial Valley district unless its applicability was foreclosed by some other provision of the Boulder Canyon Act. 447 U.S. at 368-69. The Court found such a bar in the provision of Section 6 of the Boulder Canyon Act that Boulder Canyon Project works were to be used for the "satisfaction of present perfected rights." The court concluded, in light of the section's express language, legislative history, and contemporary construction by government officials, that rights to water from the Colorado that had been acquired in accordance with state laws and exercised by actual diversion and application of a specific quantity of water to a defined area of land before the effective date of the Act were not subject to the 160-acre limitation. 447 U.S. at 368-78.

The provision of Section 6 of the Boulder Canyon Project Act which the Supreme Court read as exempting "present perfected rights" from acreage limitation is central to the decision in *Bryant*. There is no equivalent exception in the Flood Control Act of 1944, applicable to the Pine Flat Project.

Tulare relies on the following language of Section 8 of the 1944 Act:

> Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this Section, but *the foregoing requirement shall not prejudice lawful uses now existing*.

(emphasis supplied). As we held in *Turner v. Kings River Conservation District*, 360 F.2d 184, 193-194 (9th Cir. 1966), however, the italicized language refers to uses to which projects operated by the Secretary of War were being put at the effective date of the 1944 Act. It refers neither

to private water rights nor to projects, like Pine Flat, that were not in existence when the 1944 Act was passed.

Furthermore, unlike the situation in *Bryant*, neither legislative history nor contemporaneous administrative interpretation of the statute authorizing the Pine Flat Project (the Flood Control Act of 1944) supports an exemption of the project from the 160-acre limitation. To the contrary, as the opinion in *Tulare I* demonstrates at length, both the legislative history and administrative construction of the Flood Control Act of 1944 clearly reflect a Congressional intent that the acreage limitations apply to the Pine Flat Project.

Equally wide of the mark is Tulare Lake Canal Company's reliance upon the following provision of Section 8 of the 1902 Act:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State . . . relating to . . . water in irrigation, or any vested right thereunder . . . and nothing herein shall in any way affect any right of . . . any landowner, appropriator, or user of water in, to or from an interstate stream . . . .

As we have pointed out, the Supreme Court in *California* explicitly reaffirmed its holding in *Ivanhoe* that the acreage limitation in Section 5 of the 1902 Act preempted contrary state law despite the provisions in Section 8. As we have also noted, the Company has suggested no reason why Section 8 of the 1902 Act should have a different effect upon the acreage limitation in Section 46 of the 1944 Act, involved in *Tulare I*, than it has upon the acreage limitation in section 5 of the 1902 Act.

Thus the acreage limitation imposed by Section 5 of the 1902 Act and subsequent statutes applies despite Section 8 of that Act unless there is another applicable statutory provision reflecting a congressional intention that it should

not apply to the particular project. As we have explained, there is no such provision applicable to the Pine Flat Dam. Even if there were, it would not change the result in *Tulare I*. Under our decision water rights that existed when the Pine Flat Project was initiated are not affected by the 160-acre limitation. Owners of excess lands may continue to receive all the water to which thy were entitled prior to the construction of the project without executing contracts for the sale of the excess lands. *See* 535 F.2d at 1095 & n.3, 1143-44.

II. *The Constitutional Issues: Appeals in Nos. 78-1378 and 78-1422*

The Supreme Court reviewed and rejected a wide range of constitutional challenges to the imposition of acreage limitations in federal reclamation projects in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 294-300 (1958). The constitutional arguments raised by appellants fare no better.

Appellants argue that because the acreage limitation imposed by federal reclamation law do not apply east of the 100° meridian, farmers west of that meridian are denied equal protection of the laws. Differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment. "[T]erritorial uniformity is not a constitutional prerequisite." *McGowan v. Maryland*, 366 U.S. 420, 427 (1961). *See also Toyota v. Hawaii*, 226 U.S. 184, 191 (1912). As the Court noted in *California v. United States, supra*:

> the final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the 'Great American Desert,' brought the participants in that expansion face to face with the necessity for ir-

> rigation in any way that no previous territorial expansion had.

438 U.S. at 648. The Reclamation Act of 1902 and the statutes that followed provided the means for funding the massive projects needed to complete the reclamation of the vast arid areas of the west. *Id.* The reclamation statutes are a rational legislative response to climatic differences between the western region and the remainder of the nation. Provision for acreage limitation are a reasonable means of furthering the public purposes underlying these statutes. *Ivanhoe*, 357 U.S. at 297; *Tulare I*, 535 F.2d at 1119-20.

Appellants argue that "it is unconstitutional for the United States to seek the breakup of large landholdings." Section 46 of the 1926 Act establishes restrictions on the use of water available only because of the construction of the facilities financed by the government. Congress had the power to authorize such projects and to impose reasonable conditions, such as the acreage limitation, "relevant to the federal interest in the project and to the over-all objectives thereof." *Ivanhoe*, 357 U.S. at 295.

Appellants assert that *Ivanhoe* involved government-owned water and a substantial government subsidy, and that the Pine Flat Project involved neither. As pointed out earlier, the acreage limitation applies only to the receipt of water that became available because of the federally financed project. An owner who declines to sell land in excess of 160 acres will continue to receive, for use on all of his lands, all of the water to which he was entitled before the project was built. *Tulare I*, 535 F.2d. at 1095 & n.3, 1143-44. Contrary to appellants' position, the Pine Flat Project did involve a federal subsidy to provide this and other benefits justifying the imposition of reasonable conditions upon receipt of the benefits. *Tulare I*, 535 F.2d at 1113, 1120-21 & nn.101-06, 1144.

Appellants argue that water users had a vested right to be relieved of acreage limitations by paying an allocable share of project construction costs, and that they were deprived of that right without due process of law. But, as we held in *Tulare I*, 535 F.2d at 1118-43, no such right exists.

Finally, appellants argue the district court erroneously refused to allow discovery that would have shown a denial of equal protection in exempting other projects from the acreage limitation but not Pine Flat. Appellants had ample opportunity for discovery during the eight years this case was pending in the trial court prior to the first appeal.

The petition to recall the mandate in 72-2322 is DENIED. The judgment of the district court appealed in 78-1378 and 78-1422 is AFFIRMED.

RE: *United States v. Tulare Lake Canal Co. — Nos. 72-2322, 78-1378, 78-1422*

WALLACE, Circuit Judge, concurring in the judgment:

I join in Part II of the majority's opinion addressing the constitutional issues adjudicated by the district court on remand. I agree with the majority's conclusion in Part I that *California v. United States*, 438 U.S. 645 (1978), and *Bryant v. Yellen*, 447 U.S. 352 (1980), do not affect our holding in *Tulare I*. I object, however, to the manner in which the majority has treated Tulare Lake Canal Company's argument concerning section 8 of the 1902 Act, and write separately to emphasize that our decision should not be construed as permitting the 160-acre limitation to apply to the receipt of waters to which private landowners have riparian or appropriative rights previously vested under state law.

Along with the majority, I do not believe that *California* or *Bryant* undercut the Supreme Court's holding in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958) (*Ivanhoe*). I agree that the Flood Control Act of 1944 contains no express provision exempting "present perfected rights" comparable to that of the project statute involved in *Bryant*. I also join the majority's holding in Part I(B): Section 8 of the 1902 Act does not affect our decision because "[o]wners of excess lands may continue to receive all the water to which they were entitled prior to construction of the Pine Flat Project without executing contracts for the sale of excess lands." *Ante* at ___ . Tulare Lake Canal Company admits that the contract in this case expressly applies only to water "stored by means of the Pine Flat Dam and Reservoir and thereafter . . . relesed at times when it would not have been available in the absence of such storage and release . . . ." It is clear that the water subject to the acreage limitation simply would not have been available to the land-

owners if the project did not exist. Therefore, applying the acreage limitation to water covered by the contract does not interfere with the vested water rights of any of the parties. The landowners will continue to receive all the water to which they have pre-existing riparian or appropriative rights vested under California law free of the 160-acre limitation.

That disposes of the issue and it is unnecessary to venture beyond. But the majority opinion could be read to imply that *Ivanhoe* permits the acreage limitation to apply to the receipt of water stored by means of a federal reclamation or flood control project whether or not riparian or appropriative rights to that water had previously been vested pursuant to state law. If that is what the majority means, I do not join the dictum. The definition of "project water" in the contract involved here, quoted previously, excludes vested state water rights from the 160-acre limitation. That is sufficient to establish that our holding does not "interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder" or "affect any right of any . . . landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof" within the meaning of section 8 of the 1902 Act.

If forced to resolve this issue, I doubt I could agree with the extremely broad construction of *Ivanhoe* suggested by the majority. In *Ivanhoe*, the Court refrained from "passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field," 357 U.S. at 292, and emphasized twice that if the United States finds it necessary to acquire water rights to operate a reclamation project, or if enforcement of the acreage limitation interferes with any compensable water rights, the government must

pay just compensation for the vested rights so taken.[1] *Id.* at 291, 297. *See also Dugan v. Rank*, 372 U.S. 609, 625-26 (1963). The contracts involved in *Ivanhoe*, like those before us here, "applie[d] only to 'project water' and previously existing water supplies [were] unaffected thereby." 357 U.S. at 285. Thus, in *Bryant* the Court wrote that *Ivanhoe* did not involve "perfected rights to water that the project there involved would furnish. . . ." 447 U.S. at 372. In other words, it appears that *Ivanhoe* involved only reclamation water to which no riparian or appropriative rights had vested under California law.[2] As the Court later explained in *California*, its holding in *Ivanhoe* was simply that the acreage limitation preempts any contrary state law, and thus section 8 of the 1902 Act did not require the United States to comply with "California law [which] forbade the

---

[1]In an earlier case involving the Pine Flat Project, *Turner v. Kings River Cons. Dist.*, 360 F.2d 184 (9th Cir. 1966), we held that the Flood Control Act of 1944 incorporates those provisions of the reclamation laws which permit the United States to condemn and pay just compensation for vested water rights taken in connection with the construction or operation of the dam. *See United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1096 (9th Cir. 1976).

[2]As the California Supreme Court pointed out in its *Ivanhoe* opinion, the United States had acquired by assignment all "riparian, appropriative and prescriptive rights" to the "domestic" waters necessary to operate the Central Valley Project. *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 618-19 (1957). *See Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 285 (1958) (describing purchases and acquisitions of water rights by United States), *rev'g*, 47 Cal. 2d 597 (1957). The California court held that "[t]he water users of the state whose rights have *not* become vested . . . have an inchoate right to [an adequate supply of water] subject to like enforcement and equal protection of the law," *Ivanhoe Irrigation Dist. v. All Parties, supra*, 47 Cal. 2d at 626 (emphasis added), as the beneficiary of a trust relationship into which the United States had stepped by executing the contracts. This is perfectly consistent with the conclusion that whatever water rights were involved in *Ivanhoe* had not been vested under state law. *See also id.* at 627 (conclusion with respect to title to "unappropriated domestic waters" in the state); *cf. Bryant v. Yellen*, 447 U.S. 352, 371 n.23 (1980) (describing approach of California courts to *Ivanhoe* litigation).

160-acre limitation on irrigation water deliveries expressly written into § 5 of the Reclamation Act of 1902." 438 U.S. at 671. Citing section 8, however, the Court in *California* emphasized that the 1902 Act "clearly provided that state water law would control in the appropriation and later distribution of the [reclamation] water," *id.* at 664, and that "[t]he legislative history . . . makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *Id.* at 675.

None of this is particularly surprising. Conversely, it would be unusual if the Supreme Court in *Ivanhoe* had in fact allowed the acreage limitation to apply to water beneficially "owned" by private landowners without ever expressly addressing whether such application is an unconstitutional taking. *See Ivanhoe, supra*, 357 U.S. at 295-97 (acreage limitation did not "deprive appellees of any rights to property or water"). In one of its earliest cases involving the federal reclamation laws, the Court recognized that "Congress proceeded on the basis of full recognition of water rights having valid existence under state law," *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950), and that the Court had never held "anything like" the proposition that "the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them." *Id.* at 737. "Congress has recognized the property status of water rights vested under California law." *Id.* at 736.

Because the contracts involved here also recognize the property status of whatever riparian and appropriative water rights were previously vested in the landowners under California law, I concur in the judgment. But I must reject the majority's sweeping and unnecessary dicta to the extent they suggest that *Ivanhoe* would allow elimination of those rights without compensation.

Exhibit B.

Judgment.

This action having been tried before the Court, Honorable Myron D. Crocker, District Judge, presiding, a decision having been rendered by the Memorandum and Order entered herein on January 6, 1972, and findings of fact and conclusions of law having been entered by the Court;

IT IS ORDERED, ADJUDGED AND DECREED:

1. The laws of the United States and particularly Section 8 of the Flood Control Act of 1944 do not make federal reclamation law applicable to a dam and reservoir project authorized and constructed under said Flood Control Act and operated under the direction of the Secretary of War unless and until: (a) the Secretary of War has determined upon recommendation by the Secretary of the Interior that such a project might be utilized for irrigation purposes; (b) the Secretary of the Interior has made a report and finding that additional works in connection with said project are necessary for irrigation purposes; and (c) there has been specific authorization of such additional works by an authorization act of Congress.

2. Pine Flat Dam and Reservoir was constructed and is operated as a flood control project with incidental use for irrigation purposes under the authorization of Congress contained in Section 10 of the Flood Control Act of 1944. Because no subsequent determination was ever made by the Secretary of War upon recommendation of the Secretary of the Interior that the project could be utilized for irrigation, no finding and report by the Secretary of the Interior was ever made that the construction of additional works was necessary for irrigation purposes, no subsequent authorization act was ever passed by Congress for the construction

of any such additional works for irrigation, no canals and ditches through which water is delivered for irrigation purposes have ever been built by the Bureau of Reclamation and no supplemental water has been developed which is owned and can be sold by the United States, Section 8 of the Flood Control Act of 1944 does not make federal reclamation law, or the acreage limitation provisions thereof, applicable to the use of Pine Flat Dam and Reservoir for irrigation purposes.

3. Under the laws of the United States applicable to Pine Flat Dam and Reservoir and its use and operation for irrigation storage, neither defendant, nor intervenor defendant Tulare Lake Basin Water Storage District, is subject to any limitation or requirement of federal reclamation law that they refrain from delivering "stored water," as defined in their respective contracts with the United States, to lands in excess of 160 acres in single ownership unless and until the owner thereof executes a so-called recordable contract with the United States to sell such excess lands.

4. Defendant and intervenor defendant Tulare Lake Basin Water Storage District are not bound by the requirements of federal reclamation law in their delivery of water stored in Pine Flat Dam and Reservoir.

5. Federal reclamation law has no application to lands within the Kings River Service Area by reason of their receiving water from storage in Pine Flat Dam and Reservoir; and, therefore, no condition or limitation of said federal reclamation law can be imposed upon intervenor defendant Salyer Land Company as a requirement for its receiving water from storage in Pine Flat Dam and Reservoir.

6. Federal reclamation laws, even if applicable, do not apply acreage limitation after an entity contracting with the United States completes full and final payment of its con-

tractual obligation for reimbursable capital costs applicable to irrigation benefits.

7. Even if federal reclamation law, and the acreage limitation provisions thereof, were applicable to the receipt of water from storage in Pine Flat Dam and Reservoir, defendant was relieved of any such restriction regarding the delivery of "stored water," as defined in its contract with the United States, to lands in excess of 160 acres in single ownership by its full payment of its repayment obligation under said contract on December 23, 1963.

8. As of December 23, 1963, and at all times thereafter, the laws of the United States did not and do not prohibit the delivery of stored water from Pine Flat Dam to excess lands of a large landowner unless said owner executes a recordable contract under federal reclamation law. The provisions of Article 8 of contract number 14-06-200-691-A, between defendant and the United States, are void *ab initio* and of no effect.

9. The prayer of the United States for a permanent injunction against defendant is denied, and judgment is entered in favor of defendant and intervenor defendants that the United States take nothing by reason of its claim herein.

Dated: Mar. 15, 1972.

M. D. CROCKER
Myron D. Crocker
United States District Judge

Office - Supreme Court, U.S.
FILED
NOV 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-458

In the Supreme Court of the United States

OCTOBER TERM, 1982

TULARE LAKE CANAL COMPANY AND TULARE LAKE BASIN WATER STORAGE DISTRICT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bryant v. *Yellen*, 447 U.S. 352 ..... 2, 3

California v. *United States*, 438 U.S. 645 ..... 2, 3

United States v. *Alaska Steamship Co.*, 253 U.S. 113 4

United States v. *Tulare Lake Canal Co.* *(Tulare I)*, 535 F.2d 1093, cert. denied, 429 U.S. 1121 ..... 2, 3

Statutes:

Flood Control Act of 1944, ch. 665, Section 10, 58 Stat. 901 2

Omnibus Adjustment Act of 1926, ch. 383, Section 46, 44 Stat. 964, 43 U.S.C. 423e 1

Pub. L. No. 97-293, 96 Stat. 1261 3

Title II, Reclamation Reform Act of 1982, 96 Stat. 1263 *et seq.* :

Section 212(a), 96 Stat. 1269 3
Section 212(a)(1), 96 Stat. 1269 ..... 3, 4
Section 212(a)(2), 96 Stat. 1269 ..... 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-458

TULARE LAKE CANAL COMPANY AND TULARE LAKE BASIN WATER STORAGE DISTRICT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners bring before this Court a dispute of some 30 years' duration concerning the applicability of the 160-acre limitation contained in the federal reclamation laws[1] to owners of land who receive irrigation water storage benefits from the Pine Flat Dam on the Kings River in California. After nearly 20 years of litigation, Congress has recently resolved the question in petitioners' favor. We therefore suggest that the Court grant the petition, vacate the judgments below, and remand to the district court with instructions to dismiss the case.

[1]Section 46 of the Omnibus Adjustment Act of 1926, ch. 383, 44 Stat. 649, 43 U.S.C. 423e, prohibits the delivery of project water from a federal reclamation project to "irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres" unless the owner holding such excess lands executes "valid recordable contracts for the sale of such lands" at a price to be appraised "without reference to the proposed construction of the irrigation works • • •."

1. In Section 10 of the Flood Control Act of 1944, ch. 665, 58 Stat. 901, Congress authorized the Corps of Engineers to construct the Pine Flat Dam for flood control and other purposes. The project, which was completed in 1954, confers substantial benefits upon water users in the area by allowing them to store water for eventual release during periods in which the water is needed most for irrigation. Following completion of the project, however, the water users and the government were unable to agree on a permanent repayment contract. The water users maintained that the excess land requirements of the reclamation laws did not apply to the Pine Flat Project or, in the alternative, that those requirements ceased to be effective when the water users made an advance lump sum payment of the project costs allocated to irrigation. Because the government disagreed with the water users' interpretation of the reclamation laws, the United States commenced this litigation in 1963 to resolve the dispute.

2. The district court agreed with petitioners on both of their statutory arguments and entered judgment in their favor in 1972 (Pet. App. 1-21; 37-39). The court of appeals reversed, holding for the government on both of the statutory issues. *United States* v. *Tulare Lake Canal Co. (Tulare I)*, 535 F.2d 1093 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977).

The case was then returned to the district court for resolution of various constitutional challenges advanced by petitioners and not decided in the *Tulare I* proceedings. The district court entered judgment in favor of the government and petitioners appealed. While the appeal was pending, this Court handed down its decisions in *California* v. *United States*, 438 U.S. 645 (1978), and *Bryant* v. *Yellen*, 447 U.S. 352 (1980). Petitioners asserted that these decisions undermined the soundness of *Tulare I*, and they requested the court of appeals to recall its mandate. The

court of appeals consolidated that motion with the pending appeal. The court concluded that *California* and *Yellen* did not affect the conclusions reached in *Tulare I* (Pet. App. 23-30), and it also rejected petitioners' constitutional arguments (*id.* at 30-32).

3. We believe that the decision below was correct at the time it was rendered. After the petition for a writ of certiorari was filed, however, Congress enacted new legislation that moots the questions presented by the petition and requires that the judgments below be vacated.

On October 12, 1982, the President signed into law Pub. L. No. 97-293, 96 Stat. 1261. Title II of the new statute, known as the "Reclamation Reform Act of 1982," amends and supplements the federal reclamation laws. Section 212(a) of the Act provides (96 Stat. 1269):

> Notwithstanding any other provision of law, neither the ownership or pricing limitation provisions nor the other provisions of Federal reclamation law, including this title, shall be applicable to lands receiving benefits from Federal water resources projects constructed by the United States Army Corps of Engineers, unless—
>
> (1) the project has, by Federal statute, explicitly been designated, made a part of, or integrated with a Federal reclamation project; or
>
> (2) the Secretary [of the Interior], pursuant to his authority under Federal reclamation law, has provided project works for the control or conveyance of an agricultural water supply for the lands involved.

The Pine Flat Project is a "Federal water resources project[] constructed by the United States Army Corps of Engineers," and it does not fall within the exceptions contained in Section 212(a)(1) or (2). Accordingly, the ownership limitation provisions of the reclamation laws are no longer applicable to this Project. "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920).

It is therefore respectfully submitted that the petition should be granted, the judgments below vacated, and the case remanded to the district court with instructions to dismiss in light of Congress' action.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

No. 82-458

IN THE

Supreme Court of the United States

October Term, 1982

Office - Supreme Court, U.S.
FILED
1982
ALEXANDER L. STEVAS,
CLERK

TULARE LAKE CANAL COMPANY AND TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit.

MEMORANDUM FOR THE PETITIONERS.

ROBERT M. NEWELL, ESQ.,
650 S. Grand Avenue,
Suite 500,
Los Angeles, Calif. 90017,
(213) 629-1231,
Attorney for Petitioners.

Of Counsel:

JAMES G. MCCAIN, ESQ.,
P.O. Box 475,
Corcoran, Calif. 93212,
(209) 992-2414,

ERNEST M. CLARK, JR., ESQ.,
707 Wilshire Boulevard,
Suite 3200,
Los Angeles, Calif. 90017,
(213) 626-0211.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

No. 82-458

IN THE

Supreme Court of the United States

October Term, 1982

TULARE LAKE CANAL COMPANY AND TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA.

MEMORANDUM FOR THE PETITIONERS.

This memorandum is filed with the court pursuant to the direction of the Clerk by his letter to counsel dated December 6, 1982.

The Petitioners, Tulare Lake Canal Company and Tulare Lake Basin Water Storage District agree with the statement of the Solicitor General that the applicable provisions of the Reclamation Reform Act of 1982 (96 Stat. 1269) have rendered the pending action moot.

The Petitioners concur in the Solicitor General's recommendation that the Court grant the Petition for Certiorari, order the Judgments below vacated, and remand the case to the District Court with instructions to dismiss the action in view of the aforementioned action of the Congress.

The *Amici Curiae* have authorized counsel to represent to the Court that each of them concurs with this recommendation.

Respectfully submitted,
ROBERT M. NEWELL,
Attorney for Petitioners.

Of Counsel
JAMES G. MCCAIN, ESQ.,
ERNEST M. CLARK, JR., ESQ.

APPENDIX A.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

December 6, 1982

Robert M. Newell, Esq.
Newell & Chester
650 South Grand Avenue
Suite 500
Los Angeles, California 90017-3890

RE: Tulare Lake Canal Company and
Tulare Lake Basin Water Storage
District v. United States
No. 82-458

Dear Mr. Newell:

The Court has directed this office to call for a response to the Government's suggestion of mootness, which is contained in the memorandum of the United States filed on November 16, 1982.

Forty printed copies of this response, bearing a tan cover, shall be filed in this office and served on the Solicitor General within 15 days of the date of this letter.

Very truly yours,
/s/ A.L. Stevas
ALEXANDER L. STEVAS, Clerk

rjb
cc: The Honorable Rex E. Lee
Ernest M. Clark, Jr., Esq.
James G. McCain, Esq.
Burnham Enersen, Esq.

Office - Supreme Court, U.S.
FILED
OCT 13 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-458

In the

Supreme Court of the United States

OCTOBER TERM, 1982

TULARE LAKE CANAL COMPANY AND TULARE LAKE BASIN WATER STORAGE DISTRICT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief on Behalf of North Kern Water Storage District, The City of Bakersfield, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage District, Kaweah Delta Water Conservation District, Lower Tule River Irrigation District, Porterville Irrigation District and Vandalia Irrigation District, Amici Curiae, in Support of the Petition for a Writ of Certiorari

BURNHAM ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2222
Attorney for Amici Curiae

Of Counsel:

A. CAMERON PAULDEN
1675 Chester Avenue
Bakersfield, California 93301
Telephone: (805) 327-9661

WILLIAM D. PALMER
1326 "H" Street
Bakersfield, California 93301
Telephone: (805) 323-8277

STANLEY C. HATCH
23 East Carillo Street
Santa Barbara, California 93101
Telephone: (805) 963-1971

ERLING H. KLOSTER
2929 West Main Street
Visalia, California 93291
Telephone: (209) 733-5770

GENE R. McMURTREY
1430 Truxtun Avenue
Bakersfield, California 93301
Telephone: (805) 327-3361

KENNETH A. KUNEY
145 North N Street
Tulare, California 93275
Telephone: (209) 686-8311

McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

TABLE OF CONTENTS

	Page
Opinions Below	1
Introduction	2
Prior Proceedings	3
The Interests of the Amici Curiae	6
Reasons for Granting a Writ of Certiorari	7
Summary of Argument	7
Argument	10
1. The Court of Appeals "Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court" (Rule 17.1(c))	10
2. The Court of Appeals "Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court" (Rule 17.1(c))	13
3. The Court of Appeals "Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings *** As to Call for an Exercise of This Court's Power of Supervision" (Rule 17.1(a))	16
Conclusion	20

Table of Contents

App. Page

Appendix—Copies of Federal Statutes Involved Herein i

Reclamation Act of 1902 (32 Stat. 388):

Section 5 i

Section 8 ii

Omnibus Adjustment Act of 1926 (44 Stat. 636):

Section 46 ii

Boulder Canyon Project Act (45 Stat. 1057):

Section 6 iii

Section 14 v

Flood Control Act of 1944 (58 Stat. 887):

Section 8 v

Section 10 (Preamble and paragraph authorizing the Kings River Project) vi

TABLE OF AUTHORITIES

CASES

Pages

Brandt v. Hickel (1970), 427 F.2d 53 at 57 18
Bryant v. Yellen (1980), 447 U.S. 352 ..... 2 Passim

California v. United States (1978), 438 U.S. 645 ..... 2 Passim
Consolidated Peoples Ditch Company v. Foothill Ditch Company (1928), 205 Cal. 54 at 63 13

E. I. du Pont de Nemours and Company v. Collins (1977), 432 U.S. 46 at 57 17

Ginsberg & Sons, Inc. v. Popkin (1932), 285 U.S. 204 at 208 15

Morton v. Mancari (1974), 417 U.S. 535 at 550-551 15

Townsend v. Little (1883), 109 U.S. 504 at 512 15

United States v. California (1977), 558 F.2d 1347 2
United States v. Imperial Irrigation District (1977), 559 F.2d 509; (1979) 595 F.2d 524 and 525 3
United States v. Tulare Lake Canal Company (1972), 340 F.Sup. 1185 ..... 5, 16
United States v. Tulare Lake Canal Company (1976), 535 F.2d 1093 ("Tulare I"); cert.den. 429 U.S. 1121; rehearing den. 430 U.S. 976 ..... 2 Passim
United States v. Tulare Lake Canal Company (1982), 677 F.2d 713 ("Tulare II") ..... 1 Passim

Table of Authorities

Statutes

Pages

Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S. Code § 371 et seq.: 2

Section 5, 32 Stat. 389 3

Section 8, 32 Stat. 390 ..... 2, 9, 16

Omnibus Adjustment Act of 1926, Section 46, 44 Stat. 649.... 3

Flood Control Act of 1944, 58 Stat. 887, ... 4

Section 8 ..... 4, 9, 15, 19

Section 10 ..... 4, 6, 9, 14, 15

Boulder Canyon Project Act, 45 Stat. 1057

Section 6 ..... 3, 9, 16

Section 14 15

River and Harbor Act of 1962 76 Stat. 1173 at 1191 14

Other Material

Rules of the Supreme Court

Rule 17 10

Rule 17.1(a) 16, 20

Rule 17.1(c) 10, 13

NO. 82-458

In the

Supreme Court of the United States

OCTOBER TERM, 1982

TULARE LAKE CANAL COMPANY AND TULARE LAKE BASIN WATER STORAGE DISTRICT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief on Behalf of North Kern Water Storage District, The City of Bakersfield, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage District, Kaweah Delta Water Conservation District, Lower Tule River Irrigation District, Porterville Irrigation District and Vandalia Irrigation District, Amici Curiae, in Support of the Petition for a Writ of Certiorari

This brief is filed on behalf of the nine *amici curiae* named above with the written consents of all of the parties to the proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit to which the pending Petition for a Writ of Certiorari is addressed is *United States v. Tulare Lake Canal Company* (1982), 677 F.2d 713, herein for convenience called "Tulare II". A copy of the Opinion in *Tulare II* is included as Exhibit A in the Appendix to the Petition for a Writ of Certiorari. The earlier Opinion of

the Court of Appeals for the Ninth Circuit in this same litigation, herein for convenience called "Tulare I", is *United States v. Tulare Lake Canal Company* (1976), 535 F.2d 1093.

INTRODUCTION

Twice in the last four years it has been necessary for the Supreme Court of the United States to correct errors of the Court of Appeals for the Ninth Circuit in the interpretation and application of the provisions of the Federal Reclamation Laws (Reclamation Act of June 17, 1902, 32 Stat. 388, and acts supplementary thereto and amendatory thereof, codified in 43 U.S. Code § 371 et seq.). Unfortunately, the Court of Appeals for the Ninth Circuit has not understood these "messages" from the Supreme Court and has persisted in its erroneous construction of the Federal Reclamation Laws. It is once more necessary, therefore, for this Court to "straighten out" the Ninth Circuit in its interpretation of the Reclamation Laws.

The first such "message" to the Ninth Circuit was the Supreme Court's Opinion in *California v. United States* (1978), 438 U.S. 645, involving the Reclamation Project known as New Melones Dam on the Stanislaus River in California. The Court of Appeals for the Ninth Circuit had held, in *United States v. California* (1977), 558 F.2d 1347, that in operating the Project the Secretary of the Interior need not comply with conditions imposed by the California State Water Resources Control Board. The Supreme Court reversed, and squarely held that Congress had, in Section 8* of the Reclamation Act, directed the Secretary of the Interior to observe and comply with state water laws in all cases except those in which Congress had "clearly", "explicitly" or "specifically" directed the Secretary of the Interior to do otherwise.

The Supreme Court sent the case back to the Ninth Circuit for further proceedings to determine which, if any, of the conditions imposed by the State Water Resources Control Board were in conflict with clear, explicit or specific Congressional directives.

---

* Copies of this and other sections of Federal law involved herein appear in the Appendix.

In 1980 the Supreme Court delivered its second "message" to the Ninth Circuit in *Bryant v. Yellen* (1980), 447 U.S. 352. The Ninth Circuit had held that the acreage limitation provisions* of the Federal Reclamation Laws applied to the lands within the Imperial Irrigation District in Imperial County, California, even though such lands had pre-project water rights. *(United States v. Imperial Irrigation District* (1977), 559 F.2d 509 and (1979) 595 F.2d 524 and 525).

The Supreme Court again reversed the Ninth Circuit. It held that Section 6 of the Project Act directing that the Project works be used, among other things, for "satisfaction of present perfected rights" prohibited the Secretary of the Interior from interfering with the pre-existing water rights by imposing the acreage limitation provisions of Reclamation Law upon the use of water.

The Supreme Court also stressed the facts, discussed but brushed aside by the Ninth Circuit (559 F.2d 536-540), that before agreeing to the Project contract the District had been assured by the Secretary of the Interior that the acreage limitation did not apply to lands which already had a valid, vested water right, that the parties had negotiated and concluded their contract on that basis, and that this continued to be the official interpretation of the law for over thirty years thereafter, until it was repudiated in 1964.

The significance for this litigation of these two messages from the Supreme Court, which will be explained in detail below, was called to the attention of the Court of Appeals for the Ninth Circuit in appropriate petitions and briefs, but that Court's Opinion in *Tulare II* demonstrated either that the Court did not understand the messages or that it considered them irrelevant.

---

* Limiting to 160 acres the area of land in a single ownership which may receive project water (Sec. 5 of the 1902 Act, 32 Stat. 389, and Sec. 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649).

PRIOR PROCEEDINGS

This extremely protracted litigation is a "test case" to determine answers to the following two questions of Federal law:

First: Are the provisions of Federal Reclamation Law, and particularly the so-called acreage limitation provisions, applicable to dam-and-reservoir flood control projects, constructed by the Army Corps of Engineers pursuant to the Flood Control Act of 1944 (58 Stat. 887) and subsequent statutes, which are utilized for the regulatory storage of privately-owned irrigation water supplies?

Second: If the acreage limitations are applicable to such a project, do the limitations continue to apply after the landowners have reimbursed the United States in full for the portion of the capital cost of the project allocated by the United States to the landowners who use the project facilities for storage of their privately-owned irrigation water?

The project selected for this "test case" is the Pine Flat Project constructed by the Corps of Engineers on the Kings River in California pursuant to Section 10 of the Flood Control Act of 1944 (58 Stat. 887 at 901). The Project consists of a dam and reservoir on the main stem of the Kings River for the primary purpose of impounding the springtime flood waters, and thereby preventing extensive downstream flood damage. When space in the reservoir is not needed for flood protection it is available for the temporary storage of privately-owned water. Such storage is of value to the water right owners because it enables them to use the water for irrigation of their crops during the hot summer months when the natural flow of the stream is very low.

The Pine Flat Project was completed in 1954. For several years thereafter the irrigation districts and other entities owning water rights on Kings River negotiated with the United States for a contract to utilize the space in the reservoir for temporary, regulatory storage of their water. During these negotiations the water right owners were repeatedly assured by the Department of the Interior that the acreage limitation provisions would not apply to any contracting entity which paid the United States a "lump sum" of cash equal to its share of the portion of the construction cost allocated by the United States to "irrigation benefits". In December, 1961 the Department repudiated its prior interpreta-

tion of Reclamation Law on this point and declared that the limitations would continue to apply after such a payment. The Department agreed, however, to submit this question, and also the question whether Federal Reclamation Law applied to the Project at all, to the Federal courts for determination; hence this "test case", which was commenced in 1963.

The irrigating entity chosen for the test case was Tulare Lake Canal Company, a mutual water company organized under California law, which had a long-standing, vested water right on Kings River. The company executed a contract with the United States under which it acquired a permanent right to store its irrigation water in the Pine Flat Reservoir, whenever space might be available, and in return the company immediately paid the United States in cash for the company's share of the portion of the construction cost of the Project which the government allocated to "irrigation benefits".

After a lengthy trial the United States District Court for the Eastern District of California in 1972 rendered judgment in favor of the Canal Company on both issues, holding that the Federal Reclamation Laws did not apply to the Pine Flat Project, and that even if they did apply, the Canal Company's immediate payment in full of its share of the construction cost terminated the applicability of the acreage limitation provisions (*United States v. Tulare Lake Canal Company* (1972), 340 F.Supp. 1185). The Court's judgment was supported by detailed and extensive Findings of Fact and Conclusions of Law, a copy of which is included in the Appendix attached to the Petition for a Writ of Certiorari herein.

Because the District Court decided in favor of the Canal Company on statutory grounds, the Court did not reach the so-called constitutional issues which were raised by the Canal Company's pleadings. Those issues were reserved for later consideration if need be.

On appeal by the United States, the Court of Appeals for the Ninth Circuit reversed the District Court in 1976, deciding both

of the crucial issues in favor of the United States (*Tulare I*, 535 F.2d 1093). Petitions for Writs of Certiorari were denied, though Mr. Justice Powell would have granted the Writs (429 U.S. 1121). Petitions for Rehearing were likewise denied (430 U.S. 976).

The litigation was then returned to the District Court for trial and determination of the constitutional issues. The District Court granted summary judgment in favor of the United States on those issues in 1977 without a written opinion. Tulare Lake Canal Company promptly appealed that decision to the Court of Appeals for the Ninth Circuit.

In November, 1979 Tulare Lake Canal Company filed with the Court of Appeals a petition for recall of the mandate which that Court had issued following its decision in *Tulare I*. The basis of the petition was that the Court's decision in *Tulare I* was inconsistent with the subsequent decision of the Supreme Court in the above-mentioned case of *California v. United States*, 438 U.S. 645. In 1980, in response to a request of the Court of Appeals, the parties filed supplemental briefs with regard to the effect of the Supreme Court's decision in *Bryant v. Yellen*, 447 U.S. 352.

The appeal on the constitutional issues and the Petition for Recall of Mandate were consolidated for hearing in the Court of Appeals. They were orally argued and submitted on November 13, 1980 and decided in the Government's favor in the above-mentioned *Tulare II* Opinion on May 17, 1982 (677 F.2d 713). A rehearing was denied June 29, 1982.

THE INTERESTS OF THE AMICI CURIAE

Each of the nine *amici curiae* has a substantial interest in storing its privately-owned irrigation water in a "dam-and-reservoir" flood control project constructed by the Corps of Engineers under Section 10 of the 1944 Flood Control Act. The Projects are the Isabella Project on Kern River, the Terminus Project on the Kaweah River, and the Success Project on the Tule River, all in

California. Each of these projects is similar, both in its physical characteristics and in its legal status, to the Pine Flat Project which is the subject of this litigation.

All of the *amici curiae* are public entities organized under the laws of California. Three of them are water storage districts, three are irrigation districts, one is a water district, one is a water conservation district, and one is a city.

Each of these public entities has long-vested rights to the diversion and distribution of waters of the river on which one of these Projects was built. Each entity's water right was perfected and vested under California law long prior to construction of the project. Some of the lands in each service area are held in ownerships exceeding 160 acres per owner. Each entity owns and operates its own facilities, built many years ago without government assistance, financial or otherwise, for diverting its water from the stream channel, transporting the water to its service area, and distributing the water to the farmers.

Eight of the entities have rights, under contracts with the United States, to store their own irrigation water temporarily in the upstream flood control reservoirs when space therein is not needed for flood protection. The other entity (Rosedale-Rio Bravo Water Storage District) may in the future acquire a right to do so.

Each *amicus curiae* has an obvious and substantial interest in the outcome of this litigation. Each of them endorses and supports the Petition for a Writ of Certiorari herein.

Obtaining the correct answers to the two questions posed by this "test case" (*supra*, p. 4) is clearly of the utmost importance to these *amici curiae*.

REASONS FOR GRANTING A WRIT OF CERTIORARI
SUMMARY OF ARGUMENT

A Writ of Certiorari should be granted for each of the following reasons:

First: The Court of Appeals for the Ninth Circuit has decided

important questions of Federal law which have not been but should be settled by this Court. The importance of the two questions decided in this "test case" cannot be overstated. As indicated above, they are of vital importance to these *amici curiae.* Moreover, they are of equally vital importance to the owners of millions of acres of irrigated land in other Federal project service areas. The first question is important to all landowners throughout the entire country whose irrigation water is temporarily stored or regulated in flood control reservoirs constructed by the Corps of Engineers under the 1944 Flood Control Act and subsequent statutes. The second question is important to the same landowners and also to all landowners in the service areas of all Reclamation projects throughout the Western states.

Second: The Court of Appeals has decided Federal questions in ways which conflict with applicable decisions of this Court.

In *California v. United States, supra,* the Supreme Court held that in administering the Federal Reclamation Laws the Secretary of the Interior must comply with state laws regarding the appropriation, distribution and use of water unless the Congress "clearly", "explicitly" or "specifically" has directed the Secretary to do otherwise.

In *Tulare I* the Ninth Circuit devoted 23 pages of its printed Opinion to concluding that Congress intended Reclamation Law to apply to the Pine Flat Project on Kings River, in violation of state law. This fact alone—the very length of the Court's analysis of Congressional intent—demonstrates that the Congressional intent to that effect certainly was not "clear", "explicit", or "specific". In *Tulare II* the Ninth Circuit did not re-examine the issue in the light of the Supreme Court's mandate in *California.*

Deciding that the acreage limitation provisions of reclamation laws survive the completion of payment by the landowners of their allocated share of the construction costs of the Project, took the Court 26 pages of its Opinion in *Tulare I.* It is obvious that there was no "clear", "explicit" or "specific" Congressional directive to apply the acreage limitation, in conflict with state law, after completion of the payment of construction costs.

Both of these conclusions are in conflict with the Supreme Court's mandate in *California v. United States* that State law must be obeyed in administering Federal Reclamation Law in the absence of a *clear, explicit* or *specific* Congressional directive to do otherwise.

In holding that the *general* provisions of Section 8 of the 1944 Flood Control Act override the *specific provisions* authorizing the Kings River Project in Section 10 of the same Act, the Ninth Circuit's decision was squarely in conflict with decisions of this Court holding that specific terms in a statute prevail over general language in the same statute.

In *Bryant v. Yellen, supra,* the Supreme Court held that Section 6 of the Boulder Canyon Project Act requires the Project to be operated so as not to interfere with "present perfected water rights". The Ninth Circuit refused to follow that decision in construing the portion of Section 8 of the Federal Reclamation Act of 1902 which protects vested water rights in language even stronger than Section 6 of the Boulder Canyon Project Act.

Third: The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In neither *Tulare I* nor *Tulare II* did the Ninth Circuit make a single reference to the Findings of Fact of the District Court, or refer to or discuss the testimony of a single witness or the contents of any of the 700 exhibits. The Court ignored the record. Instead, the opinions give evidence of an enormous amount of independent research. Consequently the decisions rest in large part upon evidence not in the record and never subjected to analysis or debate by counsel for the respective parties.

Furthermore, the Opinions completely ignore the portion of the District Court's Findings of Fact which entitled the defendant to judgment as a matter of law because of its reliance, to its substantial detriment, upon assurances by top officials of the Department of the Interior that the acreage limitation provisions of Reclamation Law would cease to apply upon payment either

in a lump sum or in installments of the portion of the cost of the project allocated by the government to irrigation benefits.

In *Tulare II* the Court of Appeals overturned a District Court Finding of Fact without referring to it or reviewing the evidence on which it was based.

Finally, the Court misquoted a Federal statute.

ARGUMENT

Three of the "reasons" that will be considered by the Supreme Court in ruling on petitions for writs of certiorari, as delineated in Rule 17, are applicable here. Accordingly, quotations from Rule 17 will be used as the headings for the successive portions of our Argument.

1. The Court of Appeals "Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court" (Rule 17.1(c)).

Actually, the Ninth Circuit has decided *two* extremely important questions of Federal law, neither of which has been, but certainly should be, settled by the Supreme Court so that this "test case" will result in a final and conclusive decision of each question, applicable on a nation-wide basis.

The two questions are stated above at page 4. The Ninth Circuit answered both questions in the affirmative.

The practical effect of the Court's decision that the Federal Reclamation Laws apply to the Pine Flat Project on Kings River, is to present the owners of excess land* in the Project service area with this vexatious dilemma: either (1) they must sell their excess lands, and their water rights appurtenant thereto, at far less than fair market value, and retain the right to store their water in the Pine Flat Reservoir for only the remaining 160 acres per owner; or (2) they must forego the right to store their water for their excess lands in Pine Flat Reservoir and go back to pre-Project operations, allowing the water to flow through the Reservoir in the spring without storage, putting it in underground

* *I.e.*, lands in excess of 160 acres in a single ownership.

reservoirs and pumping it (or so much of it as does not seep away) back to the surface at great expense when needed for summertime irrigation.

The impact of this dilemma, and the excess landowner's probable response to it, are not difficult to imagine. Suppose a single individual owns 640 acres of irrigable land in the Project service area, together with a right to a sufficient quantity of Kings River water to irrigate all of the land. He will surely not decide to sell three-quarters of his farm together with the appropriate portion of his water right at far less than its real value, in order to store water for the remaining 160 acres in the Pine Flat Reservoir. Instead he will choose the second horn of the dilemma. He will allow his water for his 480 excess acres to flow through the Pine Flat Dam without storage during the spring run-off. He will put that water in spreading ponds, let it seep into the underground, and hope that most of it will remain under his land until the summer when he needs the water for irrigation on the excess land. He will then consume vast quantities of energy in pumping what water is left back up to the surface. The cost of the energy will add to his total cost of producing his crops, and to the price at which he will sell them.

Thus the Ninth Circuit would force the excess land owner either to sell his excess land at great financial sacrifice* or adopt a very inefficient, wasteful and expensive substitute for utilizing storage rights in Pine Flat Reservoir. The importance of this decision to the individual landowner in the Kings River Project area is obviously very great.

But worse than that, the Ninth Circuit's answer to the first question in this "test case" constitutes a precedent which applies to *all* owners of excess land in *all* service areas of *all* dam-and-reservoir flood control projects constructed by the Corps of

---

* The Court actually stated that this was a purpose of the acreage limitation! At page 1121 of *Tulare I* the Court said: "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale."

Engineers under the 1944 Flood Control Act and subsequent statutes, in *all* parts of the country. It applies not merely to this one project in California, it applies to every such project in every state in the Union. For example, it applies to landowners whose water is temporarily stored in the flood control reservoirs on the Columbia River; it applies to water stored behind the flood control dams on the Missouri River; and it applies to water stored in Lake Okeechobee in Florida.

Obviously the decision has a shattering impact upon growers of agricultural products throughout the country.

The Ninth Circuit's answer to the second question also has far-reaching significance. It applies to all Reclamation projects in the Western states, and to all post-1944 dam-and-reservoir flood control projects in the entire country. In holding that the acreage limitation provisions of Reclamation Law continue to apply after the landowners in a given project have paid the government in full for their allocated share of the project cost, the Ninth Circuit invalidated the so-called "pay-out principle" which had been the official interpretation of Reclamation Laws for over 40 years. During that period all of the administrators of the Department of the Interior had successively and consistently held that completion of the payment of the allocated cost terminated the acreage limitation provision. The rationale for this principle was that compliance with the acreage limitation was the *quid pro quo* for the financial subsidy represented by the interest-free financing available to landowners who repay their share of the construction cost in installments over a 40-year period *without interest*. By paying his share in full at the time of contracting for the purchase of storage space, a landowner gives up the financial subsidy represented by interest-free financing, and in return, under the "pay-out" principle, he is relieved from the acreage limitations.

When Tulare Lake Canal Company made its contract for the purchase of storage space in Pine Flat Reservoir in December of 1963, the company paid the United States in cash for its share

(determined by the United States) of the cost of constructing Pine Flat Dam and Reservoir. The landowners in the company service area were assessed proportionately for the amount of this cash payment. The result of the Ninth Circuit's decision invalidating the "pay-out" principle is that although our hypothetical 640-acre owner has paid for the right to store water for 640 acres, he cannot store more than enough for 160 acres.

Again, the impact of the Ninth Circuit's answer to the second question goes far beyond the Kings River service area. It applies to all Reclamation projects in the Western states. Moreover, because of the Ninth Circuit's answer to the first question, it also applies to all dam-and-reservoir projects constructed by the Corps of Engineers under the 1944 and subsequent acts throughout the United States, far beyond the Ninth Circuit's jurisdiction.

That these two questions of Federal law are "important" has been demonstrated. They have not been "settled" by the Supreme Court. That they should be is obvious.

2. The Court of Appeals "Has Decided a Federal Question in a Way In Conflict With Applicable Decisions of This Court" (Rule 17.1(c)).

In four respects the Ninth Circuit decisions conflict with applicable decisions of the Supreme Court.

A. The imposition of acreage limitations upon the shareholders of a mutual water company, such as Tulare Lake Canal Company, is a violation of the California state laws which require such corporations to distribute their water to their shareholders in proportion to their respective share ownerships, regardless of the acreage of their landholdings (*Consolidated Peoples Ditch Company v. Foothill Ditch Company* (1928), 205 Cal. 54 at 63). If *Tulare I* and *Tulare II* become final, the Canal Company will be required to violate California law by withholding water from excess lands.

In *California v. United States, supra,* the Supreme Court held that in administering the Federal Reclamation Laws the Secretary of the Interior may violate State laws *only* when "clearly", "ex-

plicitly" or "specifically" directed by the Congress to do so. It took the Ninth Circuit 23 pages (1096-1118) of its printed Opinion and 88 footnotes (4 to 91) in *Tulare I*, and a great deal of independent research into legislative history, to divine a Congressional intent that Federal Reclamation Laws should apply to the Pine Flat Project. If that laboriously discovered Congressional intent had been "clear", "explicit" or "specific" the Court could have decided this question in half a page.*

This was called to the Court's attention in the briefs which preceded the Court's Opinion in *Tulare II*. In that Opinion the Court brushed this issue aside, saying that *California v. United States* itself held that the acreage limitation provisions of Reclamation Law were a clear, explicit and specific Congressional mandate to override conflicting State laws (677 F.2d 716-7). That, of course is not the question. The question is whether Congress clearly, explicitly or specifically directed that Federal Reclamation Laws *should apply to the Pine Flat Project*, thus requiring Tulare Lake Canal Company to violate State law in distributing water to its farmer-shareholders. That is the question which the Court discussed for 23 pages in *Tulare I* and did not address in *Tulare II*. Clearly, *Tulare II* is in conflict with the Supreme Court's Opinion in *California v. United States*.

B. In deciding that the acreage limitation provisions apply, in violation of State law, after completion of payment of the allocated share of construction costs, the Court devoted 26 pages of its Opinion in *Tulare I* to analyzing legislative history, administrative practices and all manner of collateral sources to arrive at

---

* In contrast to this "laboriously discovered Congressional intent" is the very clear, explicit and specific Congressional directive that the New Melones Project (which was the subject of *California v. United States, supra*) should be subject to the Federal Reclamation Laws. The project originally had been authorized as a flood control project in the 1944 Flood Control Act (58 Stat. 887). In the River and Harbor Act of 1962 Congress modified the project and provided that upon its completion by the Corps of Engineers "the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws" (76 Stat. 1173 at 1191).

its interpretation of Congressional intent. If there had been a clear, explicit or specific Congressional directive to apply acreage limitation provisions, in violation of State law, after completion of payment of construction costs, the Court could have decided this question in the other half of the page.

This was pointed out in the petitions and briefs which the Court had before it when it issued its Opinion in *Tulare II*. Yet the *Tulare II* Opinion contains not one word of discussion of this issue. Thus, on this issue also, *Tulare II* is in conflict with the Supreme Court's Opinion in *California v. United States*.

C. The Supreme Court has repeatedly held that general language in a statute must yield to conflicting specific language in the same statute (*Townsend v. Little*, 1883, 109 U.S. 504 at 512; *Ginsberg & Sons, Inc. v. Popkin*, 1932, 285 U.S. 204 at 208; and *Morton v. Mancari*, 1974, 417 U.S. 535 at 550-551).

Section 8 of the 1944 Flood Control Act is a provision, which the Court of Appeals itself called "general in coverage", purporting, according to the Court, to make *all* flood control dams utilized for irrigation purposes subject to the Reclamation Laws (*Tulare II*, p. 1116). Section 10 of the same Act is a specific provision authorizing the Pine Flat Project and directing the Secretary of *War* (*not* the Secretary of the *Interior*) to make arrangements for payment to the United States "for conservation storage when used" (58 Stat. 901). In holding that the *general* provisions of Section 8 (as construed by the Court) prevail over the *specific* provision of Section 10, the Ninth Circuit clearly decided this case "in a way in conflict with applicable decisions" of the Supreme Court, cited above, holding that a *specific* provision must prevail over a conflicting *general* provision in the same statute.

D. In *Bryant v. Yellen, supra*, the Supreme Court had before it the question whether the acreage limitations provisions of Reclamation Law apply to the lands within the Imperial Irrigation District in California which had vested, pre-project water rights. The controlling statute was the Boulder Canyon Project (45 Stat. 1057), Section 14 of which provided that the Project was subject

to Federal Reclamation Law and Section 6 of which directed that the Project facilities were to be used in part for "satisfaction of present perfected rights" to the diversion and use of waters of the Colorado River. The Supreme Court held, as noted above, that this mandate to satisfy perfected water rights prohibited any interference with or impairment of those rights by the enforcement of the acreage limitation provisions of Reclamation Law.

Section 8 of the Reclamation Act of 1902 contains even stronger language protecting perfected water rights:

> "Nothing in this Act shall * * * in any way interfere with the laws of any State * * * relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder* * * *." (Emphasis supplied)

Yet the Circuit Court in *Tulare II* held that the imposition of acreage limitation provisions did not interfere with Tulare Lake Canal Company's water right which had vested under State law long prior to the authorization of the Pine Flat Project (677 F.2d at 718). This decision is in direct conflict with the Supreme Court's holding that the imposition of acreage limitation provisions in the Imperial Irrigation District *would* interfere with the District's "present perfected right".

3. The Court of Appeals "Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings * * * As to Call for an Exercise of This Court's Power of Supervision" (Rule 17.1(a)).

A. During the lengthy trial of this case in the District Court over 700 documents were introduced in evidence as exhibits, 12 witnesses testified in person, and 918 pages of reporter's transcript were produced. Following the trial the District Court in January, 1972 issued a brief Memorandum Opinion and Order (340 F.Supp. 1185) and made elaborate Findings of Fact containing 27 paragraphs, and specific Conclusions of Law.

The Opinions of the Court of Appeals for the Ninth Circuit in *Tulare I* and *Tulare II* contain not a single reference to a single Finding of Fact or a single Conclusion of Law or a single citation to the record! Instead the Court's Opinions contain innumerable references to collateral sources, including more than a dozen references to the voluminous writings of Professor Paul S. Taylor, who is an economist, not a lawyer, and is noted as an ardent and articulate crusader for *extending* the acreage limitation provisions of Reclamation Law (see, for example, the reference in footnote 109 at page 1123 of *Tulare I* to Professor Taylor's contention that the 160-acre limitation should be perpetual).

The length of *Tulare I*, its scholarly style, its inherent plausibility, and its 201 footnotes give clear evidence of an enormous amout of independent research, extending far beyond the record and the briefs of the parties. The decision rested in large part upon evidence not in the record and never subjected to analysis or debate by counsel. The Opinion is an elaborate, argumentative, dissertation based largely upon original research by the Court, or by someone else, without any reference to the record in the case before it. In truth, the Court ignored the record.

This is not the "accepted and usual" function of an appellate court. On the contrary, it is similar to the conduct of the Court of Appeals for the Eighth Circuit which the Supreme Court criticized in *E. I. du Pont de Nemours and Company v. Collins* (1977), 432 U.S. 46 at 57 in the following language:

> "We note that after receiving briefs and hearing oral argument, the Court of Appeals***undertook the unique appellate procedure of employing a university professor to assist the court in understanding the record and to prepare reports and memoranda for the court. Thus, the reports relied upon by that court included a variety of data and economic observations which had not been examined and tested by the traditional methods of the adversary process."

B. In another respect the Ninth Circuit flagrantly departed from "the accepted and usual course of judicial proceedings": it ignored the Findings of Fact which established an entirely independent and compelling ground for the judgment in favor of

Tulare Lake Canal Company, namely, the Company's defense of its detrimental reliance upon the government's assurances that by "paying out" its share of the Project cost the Company could relieve itself of the acreage limitations. The Findings clearly established that the Company and other Kings River interests had been repeatedly assured by the Department of the Interior that according to the official interpretation of the Federal Reclamation Laws, the payment in full of the Company's share of the allocated cost would relieve the Company and its shareholders of the impact of the acreage limitation provisions, that the Company had relied upon these assurances to its substantial detriment, and that to permit the government to change this interpretation of Reclamation Law would seriously prejudice the Company (Findings 24, 25 and 26; Pet. App. pages 17-19). In Finding 26 the Court said:

> "The Court is not aware of a clearer case of substantial reliance by citizens upon the Government's contemporaneous and long-standing administrative interpretation and application of federal law * * *."

The attention of the Court of Appeals was repeatedly directed to this defense, but the Court ignored it.

It is extraordinary that the Court of Appeals for the Ninth Circuit should ignore this defense of reliance, for that Court itself has repeatedly held in recent years that when a citizen has been given and has relied upon assurances by government officials as to interpretations of Federal law, those assurances cannot later be repudiated if to do so would substantially injure the citizen. In the case of *Brandt v. Hickel* (1970), 427 F.2d 53 at 57, for example, the Court of Appeals for the Ninth Circuit put the matter very succinctly:

> "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."

The failure of the Court of Appeals to deal with this defense of reliance must mean that the Court has no answer to it.

C. Another of the Ninth Circuit's egregious departures from

"the accepted and usual course of judicial proceedings" is its overturning of a clear Finding of Fact without referring to the Finding or examining the evidence in the record on which it was based. At page 719 of *Tulare II* is a bald statement that "the Pine Flat Project did involve a Federal subsidy". This statement is a flat contradiction of the District Court's Finding of Fact No. 7 (page 4 of the Appendix to the Petition herein). This Finding is not even mentioned, much less discussed, in the Court's Opinion. The circumstance that the Court made a statement contradicting a Finding of Fact, without mentioning the Finding or reviewing the evidence supporting it, indicates that the author of the Opinion did not realize the Finding existed, and suggests that he had never even read the Findings of Fact, or if he had he promptly forgot what was in them.

D. A final example: In *Tulare II* the Court misquoted a Federal statute. At page 715 the Court said:

> Section 8 of the 1944 [Flood Control] Act provides that dams such as Pine Flat shall be operated 'under the provisions of the federal reclamation laws.'"

The portion of Section 8 to which the Court referred reads:

> "SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes."

The phrase quoted by the Court ("under the provisions of the Federal reclamation laws") refers *only* to the construction, operation and maintenance of such *additional works* (for example, diversion works, canals and ditches) as the Secretary of the Interior might deem necessary for irrigation purposes. No such additional works have been or ever will be constructed by the Secretary of the Interior in connection with the Pine Flat Project. All necessary di-

version works, canals and ditches had been constructed by the water users, with their own funds, long before Pine Flat Dam was authorized, and the Secretary of the Interior has never sought authority to construct any "additional works" at the Project (Findings 10 and 12, Pet. App. 6-9).

To say, as the Court did, that the quoted phrase applies to the Pine Flat Dam is a gross distortion of the language of the statute.

* * *

Such extreme departures from the "accepted and usual course of judicial proceedings" suggest that *Tulare I* and *Tulare II* are an example of what is sometimes called "result-oriented judicial activism". In any event, the case cries for the Supreme Court's exercise of its "power of supervision" (Rule 17.1(a)).

CONCLUSION

Amici Curiae submit that a Writ of Certiorari should issue herein, *first* because the Court of Appeals for the Ninth Circuit has decided extremely important questions of Federal law which have not been, but should be, settled by the Supreme Court; *second*, because the decision interpreting Federal law is in conflict with applicable decisions of the Supreme Court; and *third* because the Court of Appeals has departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

Dated: October 13, 1982.

Respectfully submitted,

BURNHAM ENERSEN

Attorney for Amici Curiae

Of Counsel:

A. CAMERON PAULDEN

STANLEY C. HATCH

GENE R. MCMURTREY

WILLIAM D. PALMER

ERLING H. KLOSTER

KENNETH A. KUNEY

MCCUTCHEN, DOYLE, BROWN & ENERSEN

Appendix

COPIES OF SECTIONS OF FEDERAL STATUTES INVOLVED HEREIN

RECLAMATION ACT OF 1902 (32 Stat. 388):

Section 5

Section 8

OMNIBUS ADJUSTMENT ACT OF 1926 (44 Stat. 636):

Section 46

BOULDER CANYON PROJECT ACT (45 Stat. 1057):

Section 6

Section 14

FLOOD CONTROL ACT OF 1944 (58 Stat. 887):

Section 8

Section 10 (Preamble and paragraph authorizing the Kings River Project)

Reclamation Act of 1902 (32 Stat. 388)

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands

entered under this Act.

(32 Stat. 389)

SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

(32 Stat. 390)

Omnibus Adjustment Act of 1926 (44 Stat. 636)

SEC. 46. No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the excution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the

settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further,* That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment.
(44 Stat. 649)

Boulder Canyon Project Act (1928—45 Stat. 1057)

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of

Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California

until this Act shall become effective as provided in section 4 herein.

(45 Stat. 1061)

SEC. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

(45 Stat. 1065)

Flood Control Act of 1944 (58 Stat. 887)

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: ***Provided***, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

(58 Stat. 891)

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.
(58 Stat. 891)

* * * *

The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated

cost of $19,700,000: *Provided*, That the conditions of local cooperation specified in said document shall not apply: *Provided further*, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further*, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations.

(58 Stat. 901)